INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

# CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

## (INDONESIA/MALAYSIA)

## VOLUME VIII

Reply of Malaysia; Application for Permission to Intervene by the Philippines;
Written Observations of Indonesia and Malaysia;
Verbatim Records of the Hearings

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COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

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Réplique de la Malaisie; requête à fin d'intervention des Philippines;
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comptes rendus d'audience

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This case, entered on the Court's General List on 2 November 1998 under number 102, was the subject of Judgments delivered on 23 October 2001 (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 575) and 17 December 2002 (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625).

The documents relating to the case are being published in the following order:

Volume I. Special Agreement; Memorial of Indonesia.
Volume II. Memorial of Indonesia *(continuation)*.
Volume III. Memorial of Indonesia (Affidavits and Maps).
Volume IV. Memorial of Malaysia.
Volume V. Memorial of Malaysia (Maps).
Volume VI. Counter-Memorial of Indonesia.
Volume VII. Counter-Memorial of Malaysia; Reply of Indonesia.
Volume VIII. Reply of Malaysia; Application for Permission to Intervene by the Philippines; Written Observations of Indonesia and Malaysia; Verbatim Records of the Hearings.
Volume IX. Verbatim Records of the Hearings *(continuation)*.

*

For the purposes of this edition, the Court has decided that the written pleadings will be reproduced *in full*; it will therefore also include the documents annexed to those pleadings, which are not made available on the Court's website. The reproduction of all the annexed documents in this edition will enable practitioners to appreciate better the full scope of the arguments developed by the Parties in their written pleadings. As usual, the verbatim records of the public hearings appear after the pleadings; these verbatim records are published here in their final corrected versions, providing a useful supplement to the provisional versions made available on the Court's website.

Since the Court wishes to publish these documents as quickly as possible, it has been decided, where technically feasible, to reproduce the pleadings in the form in which they were submitted by the Parties.

Some documents in this edition have thus been scanned, and there are consequently two types of page numbering for the items included in these volumes: in addition to the normal continuous pagination, the original page numbers of the scanned documents are provided in brackets for reference purposes.

The Hague, 2010.

La présente affaire, inscrite au rôle général de la Cour sous le numéro 102 le 2 novembre 1998, a fait l'objet d'arrêts rendus le 23 octobre 2001 (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), requête à fin d'intervention, arrêt, C.I.J. Recueil 2001*, p. 575) et le 17 décembre 2002 (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 625).

Les documents relatifs à cette affaire sont publiés dans l'ordre suivant:

Volume I. Compromis; mémoire de l'Indonésie.
Volume II. Mémoire de l'Indonésie *(suite)*.
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Volume IV. Mémoire de la Malaisie.
Volume V. Mémoire de la Malaisie (cartes).
Volume VI. Contre-mémoire de l'Indonésie.
Volume VII. Contre-mémoire de la Malaisie; réplique de l'Indonésie.
Volume VIII. Réplique de la Malaisie; requête à fin d'intervention des Philippines; observations écrites de l'Indonésie et de la Malaisie; comptes rendus d'audience.
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La Haye, 2010.

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# REPLY OF MALAYSIA

# RÉPLIQUE DE LA MALAISIE

# CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

## INDONESIA/MALAYSIA

# REPLY OF MALAYSIA

2 MARCH 2001

# Chapter 1

## Introduction

1.1. This Reply is filed in accordance with the order of the Court of 19 October 2000. It summarises Malaysia's case, and responds to the arguments made by Indonesia in its Counter-Memorial.

1.2. It is useful to begin with a brief summary and comparison of the arguments of the two parties.

### A. Malaysia's Case for Sovereignty over the Islands

1.3. Malaysia's sovereignty over the islands is clear and well established. It follows from the following propositions, which — as will be shown in detail in the following Chapters — Malaysia has demonstrated with full reference to the available evidence.

(1) Like other islands off the east coast of Borneo (Danawan, Si Amil, Omadal, Mabul...), Sipadan and Ligitan were part of the dominions of the Sultanate of Sulu in the nineteenth century; the people of these islands owed allegiance to the Sultan, which allegiance they transferred to the BNBC from 1878.

(2) After 1878 the BNBC administered the two islands, along with the rest of the Ligitan Group, even though they fell outside the scope of the Sulu grant of 1878.

(3) The BNBC's administration of the offshore islands was not challenged by Spain or by the Netherlands. In particular, the Netherlands specifically disclaimed any title to territory or islands east of Batu Tinagat, in the negotiations for the 1891 Boundary Convention and subsequently.

(4) The BNBC's administration was recognised as a fact by the United States when the *USS Quiros* claimed title to the islands in 1903, and it was regularised as a continuing right of BNBC administration by the Exchange of Notes of 1907.

(5) The BNBC's right of administration was converted into a full right of British sovereignty as a result of the British-United States Treaty of 1930.

(6) Malaysia succeeded to British sovereignty over the islands, and its sovereignty continues uninterrupted to the present day. The exercise of that sovereignty has taken a variety of forms, including nature conservation, regulation of natural resources and tourism, security and policing, and the construction and maintenance of lighthouses.

## B. Indonesia's Case for Sovereignty over the Islands

1.4. By contrast, Indonesia's case for sovereignty over the islands depends on three propositions, *each* of which it has to establish in order to succeed. These are:

(1) *First*, that the islands were part of the Sultanate of Bulungan under Dutch sovereignty.

(2) *Secondly*, that the islands were allocated to the Netherlands by the 1891 Boundary Convention, which according to Indonesia "confirmed Dutch sovereignty over the islands".[1]

(3) *Thirdly*, that that sovereignty subsists, despite the fact that the BNBC, Britain and then Malaysia have continuously administered the two islands since 1891, without the slightest protest from the Netherlands or (until 1969) from Indonesia.

If Indonesia fails to establish any one of these three propositions, its case fails altogether. In fact it has failed to establish a single one of them. Its three-legged case fails on each leg.

### *There is no evidence whatever that the two islands were part of Bulungan*

1.5. Indonesia repeatedly refers to a "presumption" that the two islands were part of Bulungan.[2] There is no basis for such an argument. Indonesia has to prove its case and it cannot rely on any self-proclaimed "presumption". If any presumption is applicable here, it is the presumption in favour of long possession: *quieta non movere*. That presumption favours Malaysia, not Indonesia.

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[1] IC-M, vol. 1, p.42, para. 3.86.

[2] IC-M, vol. 1, p.40, para. 2.2, p.5, para. 3.81.

1.6. Leaving presumptions to one side, there is no factual basis for the assertion that the territory of Bulungan ever extended to the islands. As shown in Malaysia's pleadings:

(1) No Dutch map ever depicted the islands as part of Bulungan.

(2) They were not included in the official Dutch descriptions of the territory of Bulungan or in the Dutch contracts with Bulungan of 1850, 1878 and 1893.

(3) There is no evidence that the Sultan of Bulungan ever exercised any jurisdiction over the two islands or any others in the vicinity.

(4) The Dutch claim to territory in the period 1879-1891 was expressly limited to territory to the west of Batu Tinagat and did not extend to any land or islands eastwards of that point.

1.7. Indonesia's Counter-Memorial does not improve its case. No new document is annexed showing any administrative activity by Bulungan or the Netherlands over the two islands or any others nearby. No new map is produced which shows the two islands and attributes them to the Netherlands. Indonesia's sole evidence of sovereignty is the record of a few instances where Dutch naval vessels sailed past the islands, or mentioned them in a neutral way in dispatches. A State cannot establish sovereignty over islands (let alone displace an existing, long-standing administration) without any evidence. A State party to a Special Agreement before the Court cannot rely on a mere presumption. It has to prove its case. Indonesia fails completely to do so.[3]

*There is no evidence that the islands were attributed to the Netherlands in 1891*

1.8. There is no evidence of any kind that the islands were recognised as Dutch territory by the Boundary Convention of 1891. That Convention concerned no territory or islands to the east of Sebatik. As shown in Malaysia's pleadings:

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[3] Indonesia attempts to bolster its case by adducing a self-serving declaration made by "the present pretender to the Sultanate of Sulu" on 30 April 1997: IC-M, vol. 2, Annex 3. Even if the declarant was "one of the claimants to the North Borneo Territory" (which he is not), what probative value could possibly be attached to his mere assertions, made from the Philippines, unsupported even by the pretence that he had sought to acquaint himself with the underlying facts or by any trace of evidence? That Indonesia has felt it necessary to resort to evidence of such poor quality is indicative of the weakness of its case.

(1) The 1891 Convention was intended to resolve a dispute over the land boundary "in Borneo". On the east coast, the only area in dispute was that between Batu Tinagat and the Sibuko River, including the inshore island of Sebatik.

(2) There was no intention to create an allocation line affecting islands 40 miles to the east of Sebatik. The text of the Convention is inconsistent with any such intention, and this is confirmed both by the *travaux préparatoires* and by the subsequent practice of the parties.

(3) The internal Dutch map of 1891 does not support Indonesia's claim, and even if it did it was not opposable to Great Britain and was never accepted by it.

(4) Even if Britain had intended to grant sovereignty over the islands to the Netherlands, it could not have done so because they were more than 9 nautical miles from the coast, and thus fell outside the terms of the Sulu grant of 1878. As was confirmed in the Protocol of 1885, islands falling outside 9 nautical miles from the coast belonged to Spain.

1.9. Indeed, even if the two islands had been part of Bulungan before 1891, they would have been attributed to North Borneo by the Convention. The Netherlands explicitly did not claim any part of Borneo to the east of Batu Tinagat, and never subsequently asserted any claim to any land territory or off-shore islands to the east of the island of Sebatik.

### *The islands were never claimed or administered by the Netherlands or by Indonesia, before the invention of the dispute in 1969*

1.10. There is no evidence whatever of any claim to the islands, by the Netherlands or by Indonesia, in the years 1891-1969. Nor is there any evidence of any Dutch or Indonesian administration of the two islands at any stage, up to the present day. As shown in Malaysia's pleadings:

(1) The Netherlands never claimed or administered the islands.

(2) Dutch practice and Dutch maps are quite inconsistent with any Dutch claim to the islands.

(3) Indonesia has never at any time administered the islands, which it only claimed 24 years after independence.

(4) Indonesian practice and Indonesian maps are quite inconsistent with any claim to the islands.

## C. The Two Cases Compared

**1.11. Whereas Indonesia has to prove each and every element of its case in order to succeed, Malaysia's case is robust.**

**1.12. Even if (*quod non*) the islands were not part of Sulu, they are now Malaysian, since Malaysia and its predecessors in title have administered them for many years, and Malaysia continues to do so.**

**1.13. Even if (*quod non*) the islands had ever, even arguably, been part of Bulungan, they are now Malaysian, because no claim was made to them by the Netherlands in 1891 or at any later time.**

**1.14. Even if (*quod non*) they had been notionally allocated to the Netherlands in 1891, they are now Malaysian, because Britain could not have granted sovereignty over them in 1891, and thus the 1891 Convention is irrelevant as the basis for Indonesia's case.**

**1.15. Even if (*quod non*) the islands were simply abandoned by the United States after the *USS Quiros* laid claim to them in 1903, they would still be Malaysian, because they have been administered as part of North Borneo ever since.**

**1.16. Even if (*quod non*) the 1930 Treaty did not cover the islands, they are Malaysian because they were not ceded to any State other than Britain, which continued to administer them.**

**1.17. Even if (*quod non*) the Indonesian argument as to the 1891 Convention were tenable, the islands would now be Malaysian, because Britain and Malaysia subsequently consolidated their title to them.**

**1.18. Even if (*quod non*) Indonesia inherited from the Netherlands some vestige of historic title to them (which title the Netherlands never claimed), the islands would now be Malaysian because they have been administered by Malaysia and its predecessors for more than a century, and**

that administration is what matters — not hitherto unformulated inferences from an unpublished map.

## D. Structure of this Reply

1.19. This Reply consists of four further Chapters. Chapter 2 summarises and restates Malaysia's case for the islands, with cross-references to the documentary and other evidence. Chapter 3 refutes Indonesia's arguments based on the "sovereignty" of Bulungan. Chapter 4 refutes its arguments as to the 1891 Convention. Chapter 5 refutes its arguments based on *effectivités* since 1891. Malaysia's submissions follow.

# Chapter 2

## Malaysia's Case as Established by the Evidence

### A. Overview

2.1. Given the complete lack of supporting evidence, Indonesia's assertion that its case is "straightforward" is surprising.[1] Indonesia seeks to bolster its case by attributing to Malaysia a series of arguments Malaysia does not make and by misrepresenting the arguments Malaysia does make.[2] It is necessary, therefore, to summarize that case, referring at the same time to the substantial documentary and other evidence adduced in the pleadings of both parties.

2.2. As noted in paragraph 1.3 above, Malaysia's case is based upon six basic propositions. Taken in historical and chronological order these are as follows:

(1) Like other islands off the east coast of Borneo (Danawan, Si Amil, Omadal, Mabul…), Sipadan and Ligitan were part of the dominions of the Sultanate of Sulu in the nineteenth century; the people of these islands owed allegiance to the Sultan, which allegiance they transferred to the BNBC from 1878.

(2) After 1878 the BNBC administered the two islands, along with the rest of the Ligitan Group, even though they fell outside the scope of the Sulu grant of 1878.

(3) The BNBC's administration of the offshore islands was not challenged by Spain or by the Netherlands. In particular, the Netherlands specifically disclaimed any title to territory or islands east of Batu Tinagat, in the negotiations for the 1891 Boundary Convention and subsequently.

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[1] IC-M, vol.1, p.5, para. 2.1.

[2] To take just two examples, Malaysia has never suggested that the two islands in dispute were ceded to the BNBC by the Sultan of Sulu (but see IC-M, vol.1, p. 7, para. 2.10), or that there was a single "Bajau entity" on the east coast of Borneo (but see IC-M, vol.1, p.26, para. 3.41). Indonesia's extensive treatment of these "arguments" is off the point.

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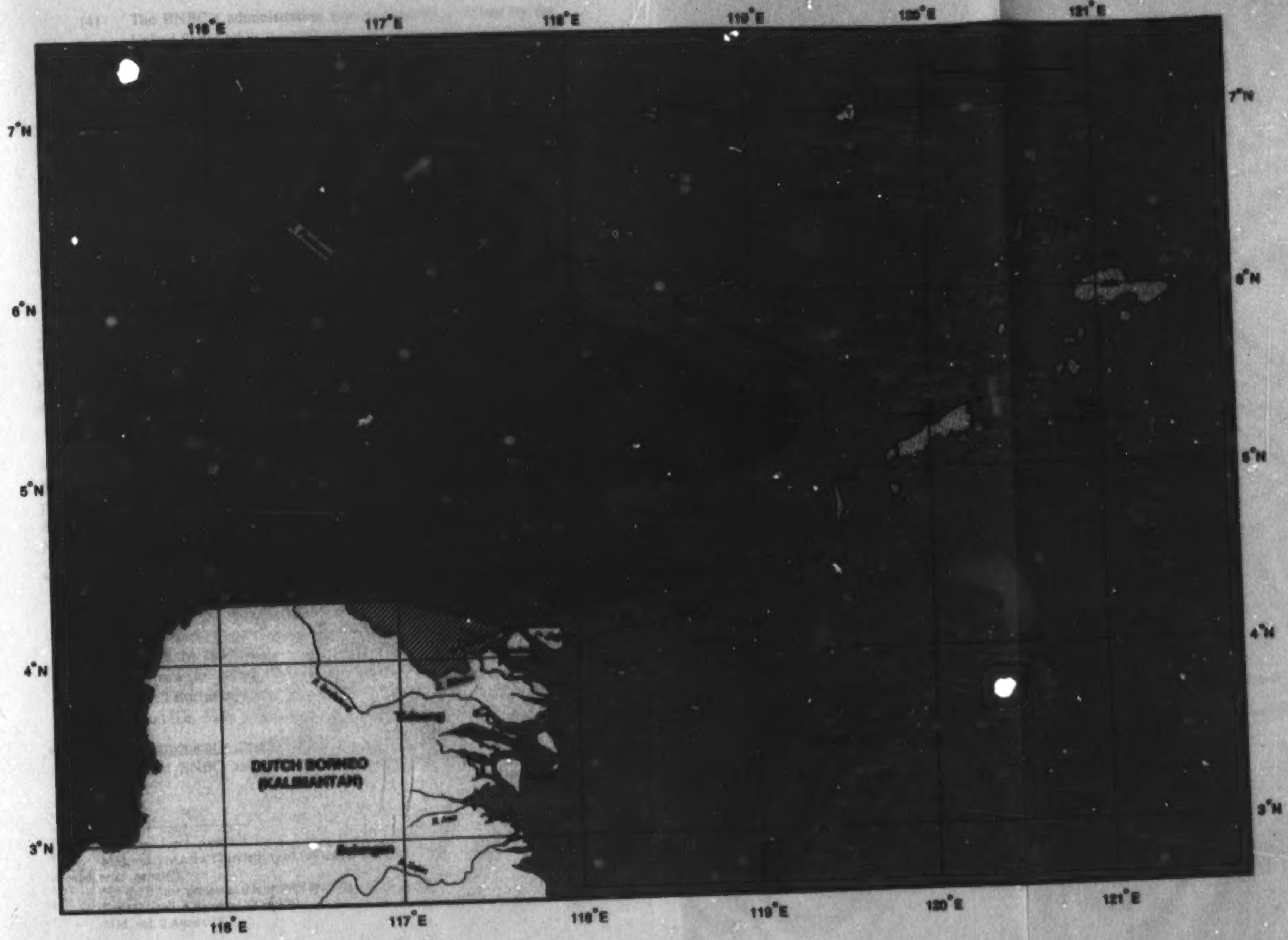
## Insert 1

North Borneo Coast, Sulu Archipelago, 1878 Sulu Grant and Territorial Dispute with the Netherlands



(4) The BNBC's administration was recognised as a fact by the United States when the *USS Quiros* claimed title to the islands in 1903, and it was regularised as a continuing right of BNBC administration by the Exchange of Notes of 1907.

(5) The BNBC's right of administration was converted into a full right of British sovereignty as a result of the British-United States Treaty of 1930.

(6) Malaysia succeeded to British sovereignty over the islands, and its sovereignty continues uninterrupted to the present day. The exercise of that sovereignty has taken a variety of forms, including nature conservation, regulation of natural resources and tourism, security and policing, and the construction and maintenance of lighthouses.

2.3. Indonesia claims that the Malaysian case is "confused" and "contradictory".[3] But there is nothing either confused or contradictory about these propositions. They present a coherent picture, reflected in the documentary record and consistent with the international law of the time.

2.4. It is true that there were, at various stages, disagreements between some of the actors. But these disagreements were resolved and the picture that emerges is both clear and historically-attested. Three temporary disagreements appear from the record, involving successively Spain, the Netherlands and the United States. They were as follows:

- The disagreement with Spain (1878-1885). Initially Spain did not recognise the validity of the Sulu grant of 1878, and after the final capitulation of the Sultanate later in that same year,[4] it attempted to seize Sandakan, the principal BNBC administrative centre on the east coast.[5] But the Spanish claim was opposed by the local leaders and by Britain, and its attempt failed.[6] Subsequently, Spain expressly recognised British authority over North Borneo, to the full extent of the Sulu grant (i.e. down to the Sibuko River), by the Protocol of 1885.[7]
- The disagreement with the Netherlands (1878-1891). The Netherlands recognised BNBC authority over North Borneo but not to the full

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[3] IC-M, vol.1, p.1, para. 1.2.
[4] MM, vol. 2, Annex 12 (referring to "all the Archipelago of Sulu and the dependencies thereof").
[5] For the British protest at this attempt see MM, vol. 3, Annex 37.
[6] See MM, vol. 4 Annexes 78 and 79.
[7] MM, vol. 2 Annex 15.

extent of the 1878 grant.[8] A dispute arose as to the territory between the Sibuko River and Batu Tinagat, which was resolved by the 1891 Boundary Convention. The only islands affected by that dispute were Sebatik and the immediately adjacent small islands or islets. There was no Dutch claim to islands or mainland territory east of Batu Tinagat.

- The disagreement with the United States (1900-1907). Following its acquisition of the Philippines in 1898-1900, the United States did not recognise the right of the BNBC to administer islands beyond 9 nautical miles. Nor did it recognise the validity of the 1903 Confirmation by the Sultan.[9] The BNBC tried to argue on both points, but Great Britain (which had authority in the matter under the Protectorate of 1888) accepted the United States' view of the legal position. The matter was then regularised, first in the 1907 Exchange of Notes and then in the 1930 Convention.

These disagreements at the international level were well attested, were precisely formulated by the parties concerned, and were clearly resolved by the international agreements referred to, which were valid under the international law of the time. None of these transactions affected the fact of BNBC, British and later Malaysian administration of the islands, which has continued for 120 years.

## B. Concordance of the evidence supporting Malaysia's case

2.5. It is proposed to take each of the six propositions set out in paragraph 2.2 above and to provide a brief guide to the documentary and other evidence in support of each, as contained in the pleadings.

Proposition 1. Like other islands off the east coast of Borneo (Danawan, Si Amil, Omadal, Mabul...), Sipadan and Ligitan were part of the dominions of the Sultanate of Sulu in the nineteenth century; the people of these islands owed allegiance to the Sultan, which allegiance they transferred to the BNBC from 1878.

2.6. In the mid-nineteenth century, the people inhabiting the coastal areas of north east Borneo owed allegiance to the Sultan of Sulu, and were part of the procurement economy of the Sultanate. These people included the Bajaus living on the islands around Darvel Bay, in particular Omadal and the Ligitan Group (Danawan, Ligitan, Si Amil and Sipadan).

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[8] See the Dutch Colonial Minister's statement of 1879, specifying "Batoo Tinagat Rock" as the border: MM, vol. 3, Annex 40.

[9] MM, vol. 2 Annex 22.

2.7. It is clear from the evidence and from contemporary sources that the leaders of the communities along the north east coast were appointed by the Sultan and responded to his orders. Indeed after 1878 they often became local officials under the BNBC.[10] The situation was one of considerable personal continuity, and clear evidence of the succession to leadership of these communities is contained in affidavits collected in the 1970s.[11]

2.8. Indonesia tries to minimise the significance of these local communities by presenting the Bajaus as a single group of sea gypsies, wandering up and down the whole east coast and effectively beyond the jurisdiction of any of the States in the region, including the Sultan of Sulu.[12] It is true that there were Bajau communities along the coast, but these were distinct groups, not a single wandering tribe of nomads. The Bajaus of Darvel Bay had their own leaders and were based on the islands and reefs of the locality. They had a cemetery at Omadal, which still exists.[13] Local leaders were appointed or confirmed by the Sultan of Sulu; they were often themselves Sulu by birth.[14]

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[10] For example Nakoda Gumbah was the "Agent of the Sultan of Sulu charged with the superintendence of the trade on the north-east coast of Borneo" in 1875: MM, vol. 4, Annex 76. In that capacity he was the channel for orders concerning the prosecution of Bajaus from Omadal who attacked an Austrian ship in May 1875: see also MM, vol. 4, Annex 77. He was one of the local chiefs who signed the protest against the attempted Spanish occupation of Sandakan in 1878: MM, vol. 4, Annex 78 ("the matter of the transfer of this country to an English Company having been referred to us by the Sultan six months ago, we have agreed to that transfer and are bound by it"). In 1882 he was appointed "Native Magistrate of Darvel Bay, a position requiring much tact in the management of the large Bajau population". He died in 1886: for his obituary notice in the *British North Borneo Herald* see MM, vol. 4, Annex 81. He is the first on the list of 34 "indigenous leaders of the east coast of North Borneo", appointed by the BNBC in this period, in J.F. Warren, *The North Borneo Chartered Company's Administration of the Bajau, 1878-1909* (Athens: Ohio University Centre for International Studies, Papers in International Studies, Southeast Asia Series No. 22, 1971), Appendix I, reprinted in MM, vol. 4, Annex 90.

[11] See the affidavits at MM, vol. 4, Annexes 117, 118, 119, 120. These indicate a degree of continuing allegiance to the Sultan of Sulu personally, even after 1878. Thus Abu Sari (appointed headman of Danawan around 1899) paid homage to the Sultan and was jailed by the BNBC for doing so: MM, vol. 4, Annex 117, Annex 120.

[12] IC-M, vol.1, p. 26, para. 3.41 (referring to the Bajaus "in their entirety").

[13] See the photograph in MM, vol.1, p. 26, and for a description of "The Bajau's Necropolis" see MM, vol. 3, Annex 88 (1903), recording a burial of a deceased person from Danawan.

[14] As in the case of Nakoda Gumbah: above, note 10.

2.9. Sulu dominion over the east coast of Borneo and adjacent islands was recognised by other States interested in the region, and in particular by Spain and the Netherlands.

(a) Spanish claims to supremacy over the Sulu Archipelago did not extend to Borneo. Under the Spain-Sulu Treaty of 1836, an express exception was made for "Sandakan and the other countries tributary to the Sultan [of Sulu] on the continent of Borneo".[15]

(b) The Netherlands accepted Sulu authority over territory and islands in the north-east of Borneo. The very limited extent of Dutch claims to the east coast was made explicit in the 1846 Resolution of the Governor-General of Netherlands India.[16] The 1850 Contract with Bulungan claimed "the cape called Batu Tinagat and beyond the River Tanwan [*sic*]", but accepted that beyond lay "the Zulu possessions on the sea-shore".[17] The 1878 Contract used similar language.[18] Dutch maps of the period did not show the islands as part of Bulungan; if they were shown at all it was as part of the dominions of Sulu.[19] Nor was there any attempt by the Netherlands to exercise any territorial jurisdiction over the islands east of Batu Tinagat.[20]

2.10. Sulu dominion over the islands off-shore of Borneo was also recognised by contemporary writers on Sulu.[21]

2.11. The Sulu Grant of 22 January 1878 to the promoters of the BNBC extended "as far as the Sibuku River in the south" and included "all the islands included therein within nine miles of the coast".[22]

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[15] MM, vol. 2, Annex 1. The Additional Stipulations of 30 August 1850 applies to "the territory which forms the extent of islands situated within the limit of Spanish rights": MM, vol. 2, Annex 2. The Renewed Act of Submission between Sulu and Spain of 19 April 1851 did not mention Borneo: MM, vol. 2, Annex 4. In the Protocol of Sulu, 30 May 1877, Great Britain and Germany only recognised the rights of Spain to control and tax trade in those parts of the Sulu Archipelago actually occupied by Spain: see MM, vol. 2, Annex 5.

[16] IM, vol. 2, Annex 10.

[17] MM, vol. 2, Annex 3, Article II.

[18] MM, vol. 2, Annex 11 ("Next the Solokh Possessions on sea the angle called Batoe Tinagat, and then the River Tawan").

[19] See MM, vol. 5, Map 3.

[20] For Indonesia's claims based on the 1876 voyage of *HNLMS Admiraal van Kinsbergen* see below, paragraphs 3.23, 4.9, 5.29.

[21] In his account of the Sulu archipelago in 1837, James Hunt specifically mentioned Pulo Gaya and "Separan with abundance of green turtle": MM, vol. 3, Annex 34. "Separan" or "Siparan" was the earlier form of Sipadan.

[22] MM, vol. 2, Annex 9. For the accompanying Commission to von Overbeck see MM, vol. 2, Annex 10. The Commission instructed "all the Dato's, Nobles Governors

Proposition 2. After 1878 the BNBC administered the two islands, along with the rest of the Ligitan Group, even though they fell outside the scope of the Sulu grant of 1878.

2.12. The BNBC[23] extended its administration to the whole of the east coast, including off-shore islands beyond 9 nautical miles.

2.13. BNBC control was extended through a series of steps, including the following:

- Early punitive expeditions, where necessary to deter or punish crimes against settlements such as Silam;[24]
- The appointment of prominent local Sulu and Bajau persons as magistrates and village headmen;[25]
- The foundation in 1887 of the new settlement of Semporna, which became a local administrative and trading centre;[26]
- In 1896, Bajau communities living in the surrounding islands were encouraged to move to a new boat settlement in Trusan Treacher, near Semporna:[27] the settlement exists to this day;
- In 1901 measures were introduced for the registration of all boats including native canoes and sailing boats.[28]

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Chiefs and officials who have received powers from us in the said coast lands" to accept von Overbeck and his successors "as supreme ruler over the said dominions".

[23] The BNBC was incorporated by royal charter in 1881: MM, vol. 2, Annex 14. The Charter recited the terms of the Sulu grant of 1878 ("as far as the Sibuco River with all the islands within three leagues of the coast belonging thereto"). In 1888 the BNBC was brought under British protection: see the Agreement of 12 May 1888, MM, vol. 2, Annex 16.

[24] E.g. the operations of *HMS Zephyr* in 1886 against Omadal: MM, vol. 4 Annex 80, described in the *British North Borneo Herald* as "the last Bajow stronghold": MM, vol. 4, Annex 82. For subsequent measures see MM, vol. 4, Annex 83 (Danawan, 1892); MM, vol. 4, Annex 84 (Omadal, 1892).

[25] MM, vol. 4 Annex 90. The headman of Danawan was Panglima Abu Sari (appointed ca. 1899). See the affidavit of his son, Tiliran Abdul Majid, made in 1975 when he was 80: MM, vol. 4 Annex 117. Indonesia concedes that "it would not have been unusual for the Sultan of Sulu to have appointed chiefs on the island of Danawan...": IC-M, vol.1, p.30, para. 3.53.

[26] MM, vol. 4, Annex 82. The first Native Chief of Semporna was Panglima Udang, appointed in 1889: see MM, vol. 4, Annex 120. His jurisdiction extended to Danawan, Omadal and Ligitan. Subsequently he acquired from the original holders certain rights to collect turtle eggs on Sipadan: ibid.

[27] MM, vol. 4, Annex 86, Annex 89.

[28] MM, vol. 4, Annex 87 and see MM, para. 6.5, note 13.

2.14. As far as Sipadan is concerned, this island was considered an "appanage" of Danawan,[29] and as part of the Ligitan group of islands. The term "Ligitan group" was applied at the time to the four islands, Danawan, Si Amil, Ligitan and Sipadan.[30] It is not a Malaysian invention.[31] Nor is it to be confused — as Indonesia apparently confuses it[32] — with the Ligitan reefs (Terumbu Ligitan), further to the east.[33] The linkage between Danawan, Si Amil and Ligitan was obvious enough, because they were all located on the large star-shaped reef.[34] The linkage between Sipadan and Danawan arose in particular because residents of Danawan held the exclusive concession to collect turtle eggs on Sipadan, a concession originally granted by the Sultan of Sulu and subsequently reissued and regulated by the BNBC. The headman of Danawan had jurisdiction over the following islands and adjacent fishing grounds: Danawan, Ligitan, Si Amil, Kapalai and Sipadan.[35]

2.15. Steps taken by the BNBC to regulate turtle egg collection — the principal activity carried out on Sipadan for many years — included the following:

- The resolution of disputes between the initial concession holders, Panglima Busari (Abu Sari) and Maharajah Mahmud;[36]
- The earlier grant to collect turtle eggs on Sipadan was replaced by a grant ("*Surat Katrangan*") issued at Lahad Dato on 6 May 1916 by the Acting Resident;[37]

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[29] MM, vol. 3, Annex 63.

[30] See the clear description of the Ligitan group in the authoritative British sailing directory of 1890: J.P. Maclear (comp.), *Eastern Archipelago, Part I (Eastern Part)* (London, Hydrographic Office, Admiralty, 1890) pp. 182-189; MC-M, , vol. 2, annex 1, cited in MC-M, para. 1.3. Sipadan is described as "the southernmost of the group". The account of the survey voyage of *HMS Egeria* in the British North Borneo Herald in 1892 refers to "a clear channel established to the north of the Ligitan Group up to Si-Amil Island": MM, vol. 4, Annex 85; see also the full account of the Darvel Bay Survey, which is at IM, vol. 3 Annex 89.

[31] The phrase is used on Dutch maps, for example the 1941 map of North Borneo, where it clearly designates Ligitan, Siamil and Sipadan: see MC-M, vol. 2 (Map 7).

[32] IC-M, vol.1, p.127, para. 7.18.

[33] Captain Field of the *Egeria* clearly appreciated the distinction. In his hand-written notes of the Egeria's survey of Darvel Bay, he treats Si Amil, Panawan [*sic*], Sipadan and an unnamed "small isle" in the location of Ligitan under the heading of the "Ligitan Group", before going on to deal with the Ligitan Reefs: IM, vol. 3, Annex 90. In the attached sailing instructions he gives the "small isle" the name "Ligitan Islet": ibid.

[34] See the satellite photographs in MM, vol. 1, pp. 16, 20 and 23.

[35] MM, vol. 4, Annex 117.

[36] See the letter from the Assistant District Officer (Barrault), Semporna to the Resident, East Coast, 26 June 1910: MM, vol. 4 Annex 91. Both Panglima Busari and Maharajah Mahmud are listed as indigenous leaders resident on Danawan by Warren: MM, vol. 4 Annex 90; see also Annex 116. The decision of the Assistant District Officer was approved by the Resident: MM, vol. 4 Annex 92.

[37] MM, vol. 4, Annex 96. The grant was registered in the Magistrates office: MM, vol. 4, Annex 95.

- The Turtle Preservation Ordinance 1917 established Sipadan as a "native reserve for the collection of turtle eggs"; those entitled to collect eggs on such reserves were however "subject to any rules declared hereunder for the protection of the industry";[38]

- Subsequent agreements with respect to turtle egg collection on Sipadan were subject to approval by the Resident;[39]

- Trade in turtle eggs from Sipadan was listed as produce of British North Borneo in official publications.[40]

2.16. Indonesia does not dispute the facts about turtle egg collection by residents of Danawan.[41] Instead it seeks to explain them away as "traditional usage" and as not involving the exercise of governmental authority.[42] But this is not the point. The resolution of disputes, the re-issue of the permit, the management and conservation of the resource, the enactment of legislation with respect to turtle egg collection on Sipadan, the registration of succession and the approval of agreements, all were carried out by BNBC organs and officials acting as such. These are clear acts of government carried out *jure imperii*.

2.17. By implication if not expressly, Indonesia portrays Sipadan as an isolated, waterless, uninhabited spot. True, it had and has no permanent ground water supply. But turtle egg collection was carried out virtually every night of the season by people from Danawan, who divided the nights between them.[43] Both Sipadan and Ligitan were the subject of a complex and regular pattern of use by the local people, whose own affiliation was to Sulu and (from 1878) to the BNBC.

Proposition 3. The BNBC's administration of the offshore islands was not challenged by Spain or by the Netherlands. In particular, the Netherlands specifically disclaimed any title to territory or islands east of Batu Tinagat, in the negotiations for the 1891 Boundary Convention and subsequently.

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[38] MM, vol. 4, Annex 97. For the meaning and effect of the Ordinance see MC-M, vol.1, pp. 81-82, paras. 4.21-4.22.

[39] See the Agreement made at Semporna on 29 August 1918: MM, vol. 4, Annex 98.

[40] MM, vol. 4, Annex 99 (1922).

[41] IC-M, vol.1, p.129, para. 7.24. The only Indonesian citizen put forward as having collected turtle eggs there admits that he did so for two months at the request of a Malaysian Badjau living in Semporna: IC-M, vol. 2 Annex 31.

[42] IC-M, vol. 1, p.128, paras. 7.20-7.21, pp. 130-131, para. 7.28.

[43] See MM, vol. 4, Annexes 98, 105.

2.18. Spain. In 1885 Spain expressly recognised British rights in Borneo under the Sulu grant of 1878, in return for British recognition of Spanish sovereignty over the Sulu Archipelago.[44] In accordance with the definitions contained in Articles II and III of the Protocol of 1885, the Sulu Archipelago included all islands between Borneo and Mindanao except those covered by the Sulu grant.[45]

2.19. However there is no evidence that Spain paid any attention to the islands off the Borneo coast, whether within or outside the 9 nautical mile line. Indeed all the evidence is to the contrary.[46]

2.20. The Netherlands. In accordance with the terms of the contracts with Bulungan of 1850 and 1878, the Dutch claimed only "Terakkan, Nenvoekkan and Sebittikh, together with the small islands [islets] belonging to them".[47] Dutch maps showed its claim as stopping at Batu Tinagat,[48] and the most easterly point of Dutch occupation was the small base on the left bank of the Tawao River, which was established in 1879.

2.21. The following points may be noted:

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[44] Great Britain-Germany-Spain, Protocol of 7 March 1885: MM, vol. 2, Annex 15.

[45] The "Sulu Archipelago" was defined in Art. II of the Protocol as including "all the islands which are found between the western extremity of the island of Mindanao... and the continent of Borneo... with the exception of those which are indicated in Article III". Article III referred to the "territories of the continent of Borneo, which belong, or which have belonged in the part to the Sultan of Sulu... as well as all those [islands] comprised within a zone of three maritime leagues from the coast, and which form part of the territories administered by the company styled the 'British North Borneo Company.'" Thus the Protocol expressly recognised BNBC administration and British claims of sovereignty over the territory covered by the Sulu grant of 1878, and it treated all other islands between Mindanao and Borneo as part of the Sulu Archipelago, over which Britain recognised Spanish sovereignty. Indonesia's account (IC-M, vol.1, pp. 109-110, paras. 6.7-6.11) leaves out all reference to Article III of the Protocol and is thus valueless.

[46] See e.g. the BNBC's letter to the Foreign Office, 13 July 1903: MM, vol. 3, Annex 59 (paras. 11, 15). The Foreign Office's view is expressed in a memorandum of 10 March 1905: IM, vol. 3, Annex 109 ("The fact that the Spaniards did not interfere with the Company's control over a few small islands lying within the limits of their possessions does not seem to need much explanation...").

[47] MM, vol. 2, Annex 3, Article II. The 1878 Contract used the same language: MM, vol. 2, Annex 11. So too did the Dutch Minister for Foreign Affairs in his Note of 8 April 1881, referring to "Les Iles Terrakan, Manoekan, et Sibittikh avec les flots adjacents": MM, vol. 3, Annex 41.

[48] For the portrayal of the Dutch claim see the maps at IM, Map Atlas, Map 2 (1885), Map 3 (1888) and the internal Dutch map itself: ibid., Map 5.

- Malaysia has demonstrated the unreality of any Bulungan claim to islands so far away.[49] Indeed there is no evidence that the Sultan of Bulungan had any maritime capability at all.[50]
- The Dutch occupation of Batu Tinagat in 1879 was protested by indigenous leaders as well as by the BNBC and the British Government.[51]
- The Dutch Note of 22 December 1888 specified Batu Tinagat as the "point extrême à l'est".[52] This position was consistently maintained in the subsequent negotiations, as further demonstrated in chapter 3 below.[53]
- The small Dutch base on the Tawao River was withdrawn following the conclusion of 1891 Convention.[54]
- The effect of the 1891 Convention was clearly reflected in two Dutch official maps of 1913,[55] as well as in all subsequent Dutch maps.[56] None of these make any claim whatever to islands east of Sebatik. If they show the two islands in dispute, they attribute them to North Borneo.

In short, the effect of the 1891 Convention was the *withdrawal* of the Dutch position southwards and westwards from Batu Tinagat, not its extension 40 miles eastwards to the two islands, as Indonesia now claims.

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[49] See the expert report by Professor Houben, at MC-M, vol.1, Appendix 1.

[50] See the statement by Hageman (1855), cited in MC-M, para. 4.5.

[51] See IC-M, vol. 2 Annex 15. One of those protesting was "Pangeran Balantia of Omardal": ibid.

[52] IM, vol. 2 Annex 37. Earlier notes were to the same effect: e.g. Count de Bylandt to Earl Granville, 12 August 1882: IM, vol. 2 Annex 29 ("la souveraineté territoriale Néerlandaise à la côte nord orientale de Bornéo... commence à la mer avec le Batoe Finigal [sic] et s'étend d'abord vers le nord, puis vers l'ouest jusqu'aux montagnes centrales de Bornéo"); Count de Bylandt to Earl Granville, 1 December 1882: IM, vol. 2 Annex 31 ("fort probable que la rivière désignée dans les Concessions sous le nom de 'Siboeboe' est située à l'est de Batoe Tinigat et par conséquent en dehors du territoire Néerlandais").

[53] See the Minutes of the three meetings of the British-Dutch Joint Commission in 1889: MM, vol. 3 Annexes 44-46, especially Annex 45 ("Admitting that the statements of Mr. Treacher should be correct in so far as the regions are concerned to the eastward of Batoe Tinagat..."). The Dutch Explanatory Memorandum of 25 July 1891 correctly described Batu Tinagat "as starting-point [of the Dutch claim] at the Eastern Coast": MM, vol. 3 Annex 51. See further below, paragraphs 3.10-3.17.

[54] Evidently the base did *not* amount to much. The two responsible Dutch Ministers told the Dutch Parliament in 1891 that "[o]ur authority in Muara Tawao is solely represented by a native guard; we do not have very much there except for a small coal deposit": MM, vol. 3 Annex 52.

[55] For the Dutch East Indies map of 1913 see MM, vol. 5, Map 1. A less detailed map of the same year, attached to the administrative decision of 1 February 1913 determining the administrative structure of Eastern Borneo is reproduced at MC-M, p. 104. The boundary stops at the east coast of Sebatik, and the two islands now in dispute are not shown.

[56] For an analysis of the Dutch maps see MC-M, vol.1, pp.99-105, paras. 5.8-5.18.

2.22. Informed Dutch opinion, both before[57] and after[58] the 1891 Convention, doubted the validity of the Dutch claim to areas north of the Sibuko River, and in particular to Sebatik. There is no hint of an opinion that the territory of Bulungan extended to the coast of North Borneo and its islands 40-50 miles further east. As to actual administration of those islands by the Netherlands, there is no trace whatever.[59]

2.23. At no stage subsequent to the 1891 Convention did the Netherlands ever make the slightest claim to islands east of Sebatik, nor did it ever claim that the Treaty established an "allocation line" to the east of Sebatik. In this regard the following may be noted:

- The Delimitation Agreement of 17 February 1913 and its annexed map is inconsistent with any such claim.[60]
- So is the further Boundary Agreement of 28 September 1915.[61]
- The Dutch Resident's letter of 1923 stated, accurately, that beyond Sebatik "there are no islands, only the open sea".[62]
- The Dutch discussions in the 1920s on the drawing of a territorial sea boundary east of Sebatik are inconsistent with a pre-existing treaty limit along the 4°10' parallel.[63]

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[57] See the opinion of M. Keuchenius in the Dutch parliamentary debate of 6 December 1881, that "the dominion of Holland did not extend to the territory which was the subject of the concession to Mr. Dent": MM, vol. 3 Annex 42. See also IC-M, vol. 2 Annex 6 (citing a Dutch article of 1882, according to which the area between the Sibuko and the Tarran River was "a strip of land destitute of inhabitants, where there was hence not a single native who desired Netherlands sovereignty").

[58] See the opinion of the deputy assistant resident of Koetei, quoted with approval in the Dutch Explanatory Memorandum of 25 July 1891: MM, vol. 3 Annex 51.See also the opinions reported by Sir Horace Rumbold to the Marquis of Salisbury, 9 March 1892: IM, vol. 3, Annex 83.

[59] Indeed, in 1917 the Dutch Resident said that even the Tidoeng lands (attributed to The Netherlands by the 1891 Convention) "remain virtually excluded from the exercise of authority": MM, vol. 3 Annex 69.

[60] For the text of the Boundary Delimitation see MM, vol. 2 Annex 25. For the annexed map see MM, vol. 5, Map 23. See also Sebatik Boundary Survey, Tawao, 6 May 1914: MM, vol. 2 Annex 26. During this survey it was found that the existing pillars were not on the 4°10' line; the Parties agreed to use the pillars, not the parallel, without it occurring to anyone that (if Indonesia's argument now is right) this could have consequences further east.

[61] See MM, vol. 2 Annex 27. For the annexed map see MM, vol. 5 Map 23.

[62] MM, vol. 3 Annex 73. Resident van Kempen also notes that fishing on Sebatik "is not in the hands of the indigenous population of Boeloengan" but is "performed by the well-known Badjaus from the Solo archipelago". This confirms the position noted in the Dutch Explanatory Memorandum of 1891: MM, vol. 3 Annex 51 ("the Bajaus who live on the islands located at the North-Eastern coast of Borneo, which belong to the Sultanate of Solok, still continuously collect forest products in the disputes area and show no concern whatever for the Sultan van Boeloengan").

[63] See MC-M, vol. 2 Annexes 4-8, and for discussion MC-M, vol.1, pp. 74-80, paras. 4.10-4.18.

Proposition 4. The BNBC's administration was recognised as a fact by the United States when the *USS Quiros* claimed title to the islands in 1903, and it was regularised as a continuing right of BNBC administration by the Exchange of Notes of 1907.

2.24. Subsequent to 1891, the Dutch never challenged the BNBC's administration of or right to the islands.[64] The only challenge to the BNBC's administration of the offshore islands came from the United States, as successor to Spain,[65] beginning in 1903. While acknowledging BNBC's *de facto* administration of the islands beyond 9 nautical miles, the United States claimed title to them.[66] The United Kingdom recognised the United States' title, but the BNBC was permitted to continue its administration of the islands under the 1907 Exchange of Notes.

2.25. These facts are evidenced by the following documents:

- The voyage of the *USS "Quiros"* and associated documents.[67] From these documents the following points emerge:
  - (a) Whatever the position in point of title, the islands concerned "have always been administered by us [sc. the BNBC] since our advent here".[68]
  - (b) The islands in question included Sipadan and Ligitan, as well as Danawan and Si Amil (i.e. all the islands in the Ligitan Group).[69]

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[64] The surveying voyage of the Dutch vessel *HNLMS Makassar* in 1903 (MM, vol. 3 Annex 64; IM, vol. 3 Annex 105) treated all the points and islands mentioned as part of British North Borneo, including Mabul, Danawan, Si Amil, Ligitan and Sipadan. There is no suggestion in the report that any of the islands mentioned were Dutch. Similarly with the voyage of *HMS Lynx* in 1921: MM, vol. 3 Annex 71 ("armed sloop was sent to land [Sipadan] for information", which does not imply that Sipadan was considered Dutch territory). The fuller report in IM, vol. 4 Annex 120 is no different. See further below, paragraph 3.24.

[65] Following the War of 1898, the United States acquired the Spanish territories in the Philippines in two stages: first, by the Treaty of Paris, 10 December 1898: MM, vol. 2 Annex 19, and then as to all additional islands by the Treaty of 7 November 1900: MM, vol. 2 Annex 21 ("any and all islands of the Philippine archipelago lying outside of the lines described in Article III of the Treaty of Peace"). In the meantime the United States concluded an agreement with the Sultan of Sulu covering "the whole Archipelago of Jolo and its dependencies": MM, vol. 2 Annex 20, Art. I.

[66] See the analysis of the legal position by Secretary Hay, 3 April 1903: MM, vol. 3 Annex 55.

[67] See MM, vol. 3 Annexes 56-63; IM, vol. 3 Annexes 97-103.

[68] Resident, Lahad Dato to Lt. Boughter, 24 June 1903: MM, vol. 3 Annex 56.

[69] See MM, vol. 3 Annex 60 (Danawan, Si Amil); Annex 61 (Sipadan), Annex 63 (Danawan, Si Amil, Sipidan, Ligitan).

(c) Sipadan was considered an "appanage" of Danawan, with disputes over turtle egg collection being referred to the resident at Lahad Datu.[70]

(d) All islands on which landings were made (including Sipadan) were claimed by the United States, and plates were affixed recording that claim.[71]

(e) There is no trace in these documents of any Dutch claim, influence, control or affiliation.

- The Sulu "Confirmation" of 1903. This was obtained from the Sultan by the BNBC, once it realised that its administration of islands beyond 9 nautical miles was challenged by the United States. The Confirmation[72] included by name, among others, Omadal, Si Amil, Mabul and Danawan "and other islands near, or round, or lying between the said islands named above". The United States and Great Britain agreed that the "Confirmation" could have no legal effect.[73] But it is contemporary evidence of the actual administration of the off-shore islands by the BNBC.

- The United States map of 1903. Following the voyage of the *Quiros*, the US Hydrographic Office prepared a map which showed unequivocally the United States claim to the islands beyond 9 nautical miles, including Sipadan and Ligitan.[74] However the United States, aware of the competing BNBC claim, took "no steps… toward making good the title of the United States to those islands".[75] In response, Great Britain conceded the United States title but asked for some "consideration for the fact that the North Borneo Company had during many years carried on the administration of them under the apparent belief that the islands formed part of the company's territory".[76] This was the basis for the conclusion of the 1907 Exchange of Notes.

- The 1907 Exchange of Notes. The Exchange of Notes[77] regularised the BNBC's "temporary occupation" of islands beyond 9 nautical miles from the coast, as shown on the "Durand" map, prepared by the

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[70] MM, vol. 3 Annex 63.

[71] For Sipadan see IM, vol. 3 Annex 101. The log entry is dated 22 July 1903. It was notified to the U.S. Naval Department by cablegram dated 1 August 1903: IM, vol. 3 Annex 103

[72] MM, vol. 2 Annex 22.

[73] For the Foreign Office view see IM, vol. 3 Annex 109.

[74] MM, vol. 5 Map 5. See MC-M, para. 3.20.

[75] Secretary Hay to the British Ambassador, 10 December 1904: MM, vol. 3 Annex 65. See also IM, vol. 3 Annex 104.

[76] MM, vol. 3 Annex 66. See also Annex 67.

[77] MM, vol. 2 Annexes 23-24.

BNBC and annexed to the Exchange of Notes.[78] There was no change in the territorial status quo as a result of the Exchange of Notes. All the islands administered by the BNBC continued to be administered by them, including Sipadan and Ligitan.

**Proposition 5. The BNBC's right of administration was converted into a full right of British sovereignty as a result of the British-United States Treaty of 1930.**

2.26. In 1930, the United States relinquished title to some of the offshore islands covered by the 1907 Exchange of Notes, including the islands of the Ligitan Group, in favour of Great Britain. Sovereignty over and administration of the islands was thereby reunited in the BNBC under British protection.

2.27. The Boundary Convention of 2 January 1930[79] established a line "separating the islands belonging to the Philippine Archipelago on the one hand and the islands belonging to the State of North Borneo which is under British protection on the other hand". The line was depicted in an annexed map.[80] Article III provided that "all islands to the south and west of the said line shall belong to the State of North Borneo". The islands of the Ligitan group (including the two disputed islands), which were to the south and west of the 1930 line, thereby passed in full sovereignty to North Borneo under British protection.

2.28. In earlier memoranda both United States and British officials had noted that the identification of the islands affected by the 9 nautical mile line was a difficult matter.[81] The question was considered in more detail in preparing for the 1930 Convention.[82] It was clearly noted that the United States' proposal, which became the allocation line under the Convention, would entail that...

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[78] The first version of the map was attached to the BNBC's letter of 13 July 1903 (MM, vol. 3, Annex 59), to which the map attached to the 1907 Exchange of Notes makes express reference: MM, vol. 5, Map 6.

[79] MM, vol. 2, Annex 29.

[80] MM, vol. 5 Map 25.

[81] In his letter of 10 December 1904 (MM, vol. 3, Annex 65), Secretary Hay pointed to the difficulties in tracing a 9 nautical mile line from "the windings of an irregular coast". For the British view see MM, vol. 3, Annex 72, ("In the absence of any precise determination of this line it is impossible to say exactly how many of the islands are under American sovereignty and how many are under North Borneo sovereignty").

[82] See the Admiralty memorandum of June 1927: IM, vol. 4 Annex 123, analysed in MC-M, vol.1, p.67, para. 3.26.

> "British North Borneo would receive Buaning, Lankayan, Mantatuan, Mataking and the Ligitan Islands, to none of which she has any valid claim."[83]

2.29. The clear effect of the 1930 Convention was to withdraw the United States's claim to title over these islands in favour of Britain.[84] For nearly four decades thereafter, no State made any claim to any of them.

Proposition 6. Malaysia succeeded to British sovereignty over the islands, and its sovereignty continues uninterrupted to the present day. The exercise of that sovereignty has taken a variety of forms, including nature conservation, regulation of natural resources and tourism, security and policing, and the construction and maintenance of lighthouses.

2.30. The BNBC (1878-1946) and its successors, Britain (1946-1963) and Malaysia (1963-present) have administered the islands as sovereign territory, peacefully and without interruption, ever since.

2.31. Evidence of such administration includes the following:

- Designation of Sipadan as a "Megapode Preserve" under the Land Ordinance 1930;[85]
- Issue and subsequent revocation of licenses to take turtles on Sipadan and Ligitan;[86]
- Approval of succession to the right to collect turtle eggs;[87]
- Construction and maintenance of lighthouses or light towers;[88]

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[83] MC-M, vol. 2, Annex 3.

[84] The United States was concerned that no third State acquire any of the islands (cf. IC-M, vol. 2 Annex 30). The negotiations for the Treaty of 1930 were conducted on the basis that no third State had or claimed an interest in any of the islands concerned, including the Ligitan group: see MM, vol. 3, Annex 72. In other words, the issue arose exclusively between the United States and Great Britain: see IM, vol. 4, Annex 123.

[85] MM, vol. 4, Annex 100, Annex 101.

[86] MM, vol. 4, Annex 102. The license was modified after complaints from Danawan: MM, vol. 4, Annex 103, Annex 104. See also MM, vol. 4, Annex 112.

[87] MM, vol. 4, Annex 105(1957). See also Annex 106.

[88] Approved for Sipadan in 1960: MM, vol. 4, Annex 108. The current turtle egg licensee from Danawan protested against the proposed light (MM, vol. 4, Annex 109) but the objection was overridden (MM, vol. 4, Annex 110). For the Notice to Mariners

- Regulation of tourism;[89]
- Additional measures to regulate housing[90] and to protect the environment.[91]

These matters are discussed further in Chapter 5 below.

## C. Conclusion

2.32. For these reasons, each of the six propositions put forward by Malaysia is clearly established in the documentary record before the Court. By contrast, Indonesia can only put forward doubts and quibbles and no evidence — no evidence of any Dutch claim to the islands, no evidence of any Dutch or Indonesian administration, no evidence that any official at any time before 1969 entertained the possibility that the two islands belonged to Indonesia or its predecessors in title.

2.33. Yet Indonesia now claims only the two Malaysian islands because they are below the parallel of 4° 10'N. It may be noted that it would have been nonsensical for the Dutch in 1881 to have made any such claim. The 4° 10'N line derived from the decision taken in 1889 to divide the area in dispute by selecting a point on the coast, Broershoek, which happened to have that latitude and from the subsequent decision to divide Sebatik itself using the 4° 10'N line. It is obvious that that compromise did not *extend* the area in dispute further to the east. It settled a dispute, it did not create a new one. If there *had* been a Dutch claim to Sipadan and Ligitan before 1889, this could only have been as part of a larger claim to the coastline and to the whole group of adjacent islands — in effect, to the Semporna Peninsula itself and the islands to the south of Darvel Bay. It is transparent from the record that such a claim was never made.

2.34. Thus Indonesia's case is wholly lacking in any historical foundation, quite apart from its many other deficiencies. To these, as further manifested in Indonesia's Counter-Memorial, Malaysia now turns.

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notifying the establishment of the light (1962), see MM, vol. 4, Annex 111. The equivalent notice for Ligitan (1963) is at MM, vol. 4, Annex 113. See also MM, vol. 4, Annex 115. The lights are still operational: see MM, vol.1, pp. 69-70, paras. 6.25-6.29.

[89] See MM, vol.1, p.18 para. 3.19, p.71 paras. 6.30-6.31.

[90] See MM, vol. 4, Annex 122.

[91] See MM, vol. 4, Annex 123.

# Chapter 3

# Ligitan and Sipadan did not Belong to Bulungan

## A. Introduction

3.1. A striking difference in emphasis can be noted between Indonesia's Memorial and its Counter-Memorial as regards its reliance on Bulungan as a basis for its claim. Whereas the Memorial included lengthy, albeit inconclusive, chapters on the pre-1891 history, attempting to show that the islands of Ligitan and Sipadan were under the sway of the Sultan of Bulungan,[1] Indonesia's Counter-Memorial admits there was uncertainty as to the validity of such a claim.[2] It is right to do so. As this Chapter will recount, the Sultanate of Bulungan emerged only in the early 19th century and it remained a rather small, mainly land-based, entity in eastern Borneo. This Chapter will also show that the Dutch involvement with Bulungan from the mid-19th century up to the independence of Indonesia did not entail any Dutch claims east of Batu Tinagat, or to distant off-shore islands in north-eastern Borneo. Neither can occasional Dutch naval activities be viewed as claims to sovereignty or exercises of jurisdiction over the islands.

## B. Bulungan was a Small, Land-Based Sultanate

3.2. In his expert study Professor Houben has described the evolution of the European presence in the region of South-East Asia, with particular reference to the Dutch colonial expansion, and at times retreat, in the Indonesian archipelago.[3] As regards Borneo, he noted that notwithstanding its considerable size the island had been an almost neglected area so far as foreign powers were concerned. In the early part of the 19th century the Dutch slowly developed their colonial rule over the southern and

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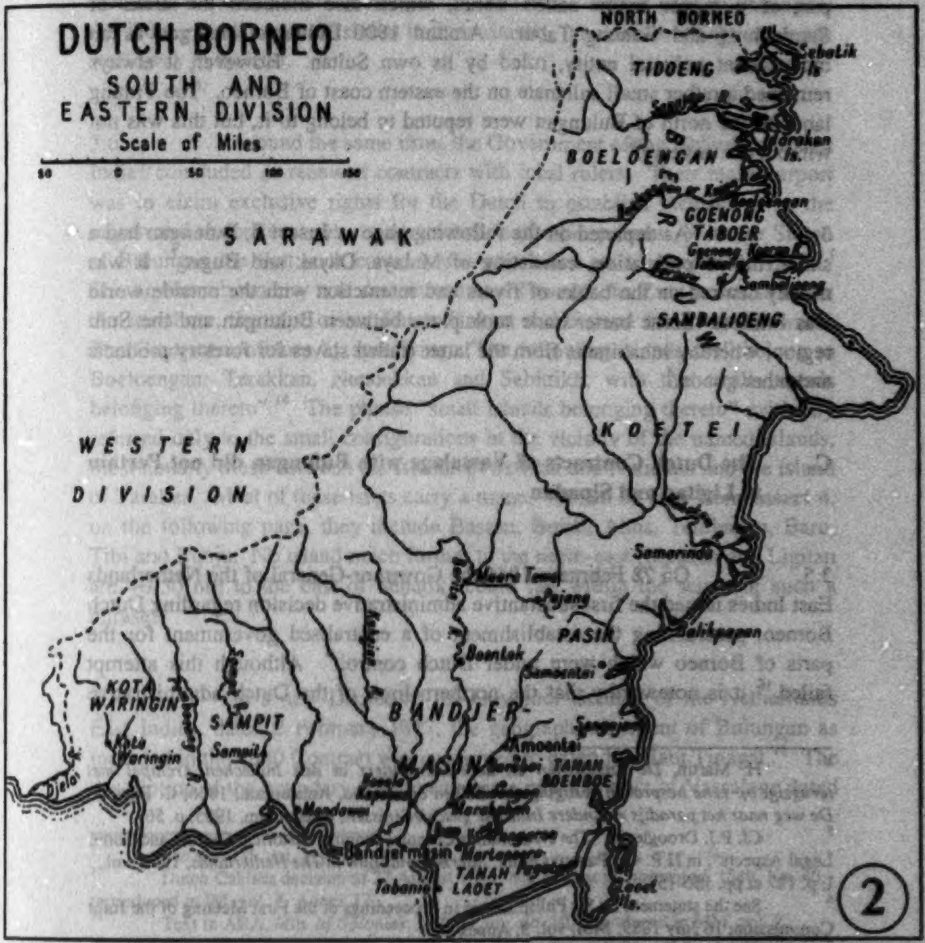
[1] See IM, vol. 1, pp. 55-60, paras. 4.55-4.72, pp. 61-78 paras. 5.2-5.33.

[2] See e.g. IC-M, vol. 1, p.41, para. 3.86: "Whatever may have been the pre-1891 situation..."; p.47, para 4.14: "...whatever ambiguities may have existed before 1891 as to the geographical scope of the territories belonging respectively to the Dutch, who succeeded to the rights and interests of the Sultan of Boeloengan, and British North Borneo..."; p.86, para. 5.69: "...the ownership of islands on either side of that line was at the time uncertain..."

[3] Professor Vincent J.H. Houben, "The Regional History of Northeast Borneo in the Nineteenth Century with Special Reference to Bulungan", MC-M, vol. 1, Appendix.

## Insert 2

**Sketch Map No. 2 from G. Irwin, *Nineteenth-Century Borneo. A Study in Diplomatic Rivalry*, The Hague, 1955**



western part of Borneo. Yet, even in mid-century the Dutch seriously contemplated selling their rights in Borneo to another European power.[4] Active Dutch involvement with Borneo would always remain rather limited.[5]

3.3. As can be seen from **Insert 2** (page 24), Bulungan was initially part of a bigger realm called Berau, which also included the areas of Sambialung and Gunung Tabur. Around 1800 Bulungan emerged as an independent political entity, ruled by its own Sultan. However, it always remained a rather small sultanate on the eastern coast of Borneo. The Tidung lands to the north of Bulungan were reputed to belong to it, but this was not without controversy.[6]

3.4. As depicted on the following page as **Insert 3**, Bulungan had a small, mixed population, consisting of Malays, Dayak and Bugis.[7] It was mainly centred on the banks of rivers and interaction with the outside world was limited. Some barter trade took place between Bulungan and the Sulu region, whereby inhabitants from the latter traded slaves for forestry products and other goods.[8]

## C. The Dutch Contracts of Vassalage with Bulungan did not Pertain to Ligitan and Sipadan

3.5. On 28 February 1846 the Governor-General of the Netherlands East Indies issued the first substantive administrative decision regarding Dutch Borneo, proclaiming the establishment of a centralised government for the parts of Borneo which were under Dutch control.[9] Although this attempt failed,[10] it is noteworthy that the northern limit of the Dutch administrative division was determined to be at approximately 3° 20'N.[11] Subsequently, on 27 August 1849, the Governor-General established two independent administrative areas on Borneo: the Western Division and the Southern and Eastern Division. This Decree rather loosely incorporated Dutch claims from "*Berou* together with the realm of Banjermassin, up to the water - parting with the basin of the *Kapoeas* and up to *Soengei atas* on the north eastern coast, including the whole basin of *Berou*".[12] The Decree did not refer to Bulungan, the Tidung lands or small islands in their vicinity, let alone to off-shore islands well away to the east.

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[4] H. Martin, *De Engelschen en de Nederlanders in den Indischen Archipel met terugzigt op eene besproken vestiging der Belgen op Borneo*, Amsterdam, 1866; C. Fasseur, *De weg naar het paradijs en andere Indische geschiedenissen*, Amsterdam, 1995, p. 56.

[5] Cf. P.J. Drooglever, "The Netherlands Colonial Empire: Historical Outline and Some Legal Aspects", in H.P. van Panhuys et al., *International Law in The Netherlands*, 1978, vol. I, p. 127 at pp. 156-157.

[6] See the statement by Sir Philip Currie in Proceedings of the First Meeting of the Joint Commission, 16 July 1889: MM, vol. 3, Annex 44.

[7] See also J.G.A. Gallois, "Korte aanteekeningen gehouden gedurende eene reis langs de Oostkust van Borneo verrigt op last van het Nederlands Indisch Gouvernement, door den Resident der Zuid-en Oosterafdeeling van Borneo", in *Bijdragen tot de Taal-, Land- en Volkenkunde van Nederlands-Indië*, vol. 4 (1856), p. 253.

[8] See also MM, vol. 1, p.74, para. 7.5.

[9] Text in IM, vol. 2, Annex 10.

[10] G. Irwin, *Nineteenth-Century Borneo. A Study in Diplomatic Rivalry*, The Hague, Nijhoff, 1955, pp. 158-159.

3.6. Around the same time, the Government of the Netherlands East Indies concluded or renewed contracts with local rulers. Their main purport was to claim exclusive rights for the Dutch to establish themselves in the region and to conduct trade, to the exclusion of other powers. With the Sultan of Bulungan the first such contract was concluded on 12 November 1850.[13] The northern boundary was determined as: "Towards the Zulu possessions on the sea-shore, the cape called Batoe Tinagat and beyond the River Tanwan". The Contract continues by specifying: "The following islands shall belong to Boeloengan: Terakkan, Nenoekkan and Sebittikh, with the small islands belonging thereto".[14] The phrase "small islands belonging thereto" evidently referred only to the small configurations in the vicinity of the named islands, most notably those between the islands of Sebatik and Nunukan and the island of Tarakan. Most of these islets carry a name. As can be seen from Insert 4, on the following page, they include Bassan, Bukat, Ahus, Tembagan, Baru, Tibi and Bunju. No island much further to the north-east (Sipadan and Ligitan are 40-50 nm to the east of Sebatik) could fall within the scope of such a phrase.[15]

3.7. In a new Decree of the Governor-General of the Netherlands East Indies, dated 2 February 1877, the geographical extent of Bulungan as included in the 1850 Contract was confirmed to extend to Batu Tinagat.[16] The description of the boundary was repeated in a new Contract of Vassalage dated

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[11] See also IM, vol. 1, p. 12, para. 3.10.

[12] Dutch Cabinet decision of 27 August 1849, No. 8. Text in *Staatsblad*, 1849, No. 40; reproduced in IM, vol. 2, Annex 12.

[13] Text in ARA, *Min. of Colonies*, 2.10.03, inv. no. 10, reproduced in MM, vol. 2, Annex 3.

[14] Full text in IM, vol. 2, Annex 13.

[15] Such an interpretation is in line with the decision of the Arbitral Tribunal in the *Guinea/Guinea Bissau: Dispute Concerning Delimitation of the Maritime Boundary*, Award of 14 February 1985, p. 34, para. 61, in *ILM*, 1986, vol. 25, p. 251.

[16] Decree of the Governor-General of the Netherlands Indies amending the Territorial Subdivision of the Residency Southern and Eastern Division of Borneo, 2 February 1877: IM, vol. 2, Annex 14.

2 June 1878 between the Netherlands East Indies' Government and the new Sultan of Bulungan.[17] This Contract was reported to the Dutch Parliament.

3.8. Following ratification of the 1891 Boundary Convention, the Dutch Government reported to Parliament in 1894 that the Convention had made it necessary to revise the description of the area of Bulungan appended to the 1878 Contract, in order to bring it in line with the newly-agreed boundary line. It submitted a supplementary agreement on the boundaries of Bulungan and the islands belonging to it which, following consultations with the administration of Bulungan, was concluded on 19 June 1893. This replaced the 1878 description of the area. In straightforward terms the 1893 supplementary agreement provided:[18]

> "The Islands of Tarakan and Nanukan and that portion of the island of Sebatik, situated to the south of the above boundary-line, described in the 'Indisch Staatsblad' of 1892, no. 114, belong to Boeloengan, as well as the small islands belonging to the above islands, so far as they are situated to the south of the boundary-line last mentioned."

It should be noted that the agreement refers in clear-cut terms to the text of the 1891 Convention as published in the Official Gazette 1892 of the Netherlands East Indies, No. 114 and in no way to the internal Dutch map.

3.9. No further agreements relating to the geographical extent of Bulungan were concluded between the Dutch colonial authorities and the Sultan of Bulungan.[19]

## D. No Dutch Sovereignty was claimed east of Batu Tinagat: Ligitan and Sipadan were never addressed in any Anglo-Dutch Diplomatic Correspondence

3.10. In essence, the Indonesian Counter-Memorial concedes that there was never at any time any attempt by the Dutch negotiators to claim territory east of Batu Tinagat or islands eastwards of Sebatik.[20] Indonesia tries to explain away such statements by suggesting that they should be seen in the

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[17] Text in ARA, *Min. of Colonies*, 2.10.03, inv. no. 10: reproduced in MM, vol. 2, Annex 11; IM, vol. 2, Annex 19.

[18] See "Description of the Boundaries of the Territory of Boeloengan and List of the Islands Belonging Thereto", signed 19 June 1893: in MM, vol. 3, Annex 54.

[19] There is no mention of any further agreements in parliamentary papers or in J. Eisenberger, *Kroniek der Zuider- en Oosterafdeeling van Borneo*, Bandjermasin, 1936.

[20] IC-M, vol. 1, p. 84, para. 5.68.

Insert 3

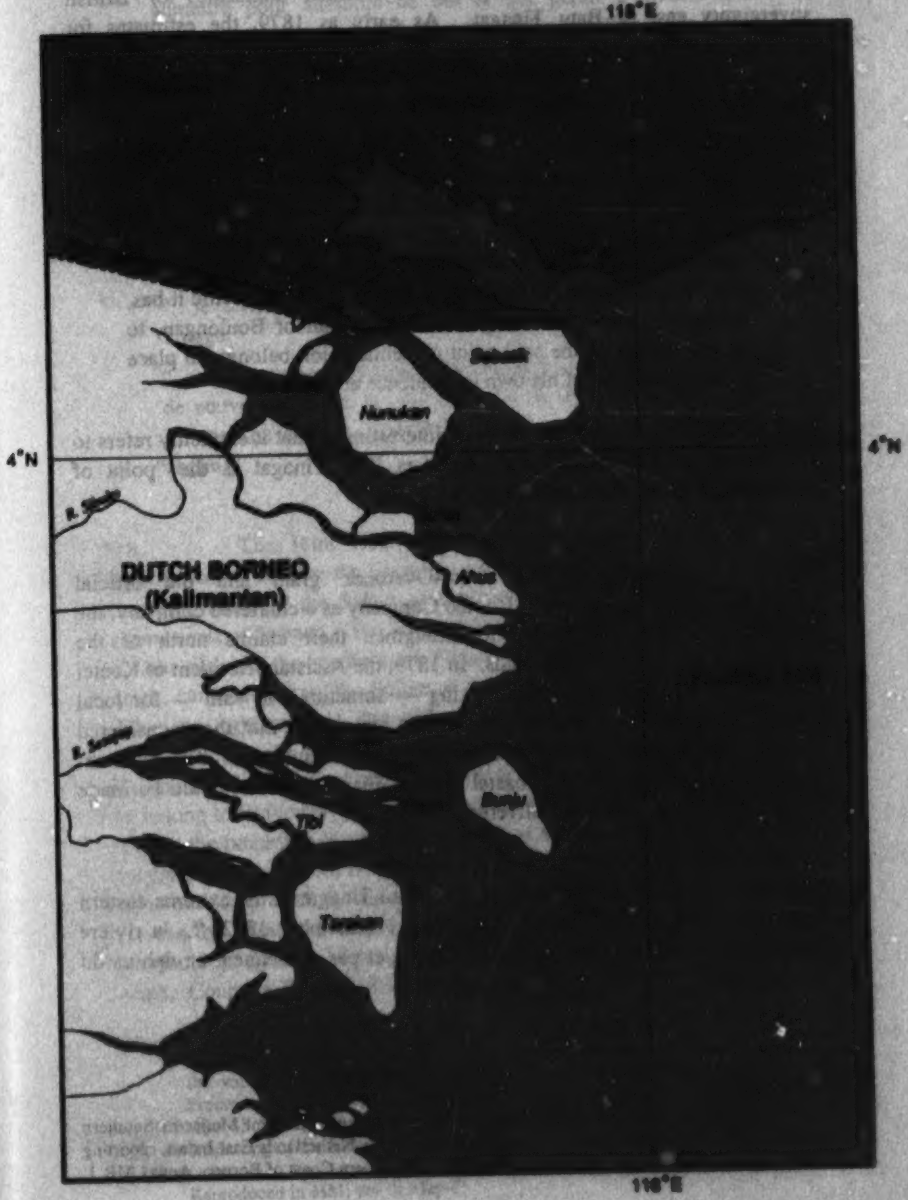
Ethnical Map of Borneo ("*Volkenkaart van Borneo*")
by R.E. Kaltofen, 1917 (Scale 1:2.500.000)

Insert 3

Ethnical Map of Borneo ("*Volkenkaart van Borneo*")
by R.E. Kaltofen, 1917 (Scale 1:2.500.000)

## Insert 4

## Small Islands belonging to Tarakan, Nunukan and Sebatik



context of the negotiations, and in particular as responses to the remarks of the British Acting Consul-General relating to the Dent-Overbeck Grant of 1878.[21] The problem with this explanation — *inter alia* — is that it does not cover the many other instances of recognition by Dutch authorities of British sovereignty east of Batu Tinagat. As early as 1879, the estimates for Netherlands India for the financial year 1880 presented to the Second Chamber of the States-General, note that "the Bato Tinagat Rock is the point of demarcation". The government statement is quite explicit:

> "In order to avoid possible misunderstandings, the Indian Government has issued orders that the Netherlands flag shall be hoisted at the point of demarcation (the Bato Tinagat Rock, at the mouth of the Tawan River, which, according to the last survey, is situated in north latitude 4°19' and east longitude 117° 31'), and that for the present it shall be watched by a cruizer, while it has, moreover, addressed a request to the Sultan of Boulongan, to whose territories the said point of demarcation belongs, to place a Representative of his own in residence at that point."[22]

This official declaration is all the more interesting in that it explicitly refers to the "Sultan of Boulongan" and considers Batu Tinagat as the "point of demarcation" of the Bulungan territories.

3.11. Spurred by the Dent-Overbeck grant and the official recognition of the British North-Borneo Company as a chartered company, the Netherlands authorities sought to strengthen their claims north of the Seboekoe river, in the Tidung lands. In 1879, the Assistant Resident of Koetei was sent to this particular area, looking — sometimes in vain — for local heads willing to swear and to sign written statements that they considered themselves to be under the authority of the Sultan of Bulungan. The Assistant Resident reported that in the coastal area no such statements could be made and no Dutch flags could be delivered.[23]

3.12. Count de Bylandt refers to Batu Tinagat as the extreme eastern claim of the Netherlands in his note dated 1 December 1882: "...la rivière désignée...est située à l'est de Batoe Tinagat et par conséquent en dehors du territoire Néerlandais".[24] In similar vein, Foreign Minister Hartsen did so as many as five times in his note of 22 December 1888 to Count de Bylandt:[25]

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[21] Ibid. For Treacher's remarks see MM, vol. 3, Annex 36.

[22] IC-M, vol. 2, Annex 16.

[23] See extract from Mailreport dated 23 June 1879 from Resident Meijer of Southern and Eastern Division of Borneo to Governor-General of the Netherlands East Indies, reporting on a mission of the Assistant Resident at Koetei to the Eastern Coast of Borneo: Annex MR 1.

> "La base que le Gouvernement Néerlandais désirerait faire admettre pour atteindre ce but et qui paraît d'ailleurs toute indiquée, en partant du point extrême à l'ouest :Tandjong Datoe, jusqu'au point extrême à l'est : Batoe Tinagat"
>
> "...Le Gouvernement du Roi a cru devoir prendre comme limites extrêmes à l'ouest : Tandjong Datoe, et à l'est : Batoe Tinagat, étant donné que les droits de souveraineté des Pays-Bas sur ces deux points extrêmes de l'Ile de Bornéo ne sauraient être contestés..."
>
> "Il en est de même du point extrême à l'est : Batoe Tinagat"
>
> "...le territoire de Boeloengan s'étend jusqu'au point Batoe Tinagat"
>
> "...le fait que les Pays-Bas exercent depuis longtemps des droits de souveraineté sur la côte orientale de Bornéo jusqu'à Batoe Tinagat ne saurait plus être contesté par le Gouvernement anglais."

3.13. The Joint Commission, set up by the British and Dutch Governments to resolve the boundary issue, had to determine the outer limits of the territories of the Sultan of Sulu and the Sultan of Bulungan on the eastern coast of Borneo. The British Government maintained that the Sultan of Sulu claimed the territory of Tidung. The British delegate, Sir Philip Currie, contended that "the Sultan of Bulungan had ceded to the Dutch what he had no right to cede, Batoe Tinagat being to the north of Si[illegible]uco, and therefore within the territory of the Sultan of Sulu".[26] In disagreement with this, the Dutch delegate Count de Bylandt emphasized that the Tidung lands did belong to Bulungan. During the course of the negotiations it was decided to settle the boundary question by way of an amicable compromise. An initial compromise proposal by the British was to take Broershoek, lying at 4° 10'N, as the boundary mark on the east coast, and to let the boundary run eastward between the islands of Sebatik and East Nunukan.[27] This proposal to include the whole of Sebatik within British North Borneo was unacceptable to the Dutch. Count de Bylandt also dismissed an informal British proposal to allow the Dutch Batu Tinagat by way of an enclave, since "...an enclave of an uninhabited and useless piece of ground can in future perhaps bring a hornets' nests of all sorts of difficulties and conflicts".[28] Finally, the negotiators agreed to split the island of Sebatik into two parts. This compromise was laid down in Article 4 of the Boundary Convention of June 1891, which will be addressed once more in the next Chapter of this Reply.

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[24] IM, vol. 2, Annex 31.

[25] IM, vol. 2, Annex 37.

[26] Proceedings of the Second Meeting, Joint Commission, 19 July 1889, pp. 9-10: MM, vol. 3, Annex 45. See also Sir Philip Currie's and Sir Edward Hertslet's statements at the First Meeting of the Joint Commission, 16 July 1889, pp. 2-6: MM, vol. 3, Annex 44.

[27] Reproduced in MM, vol. 5, Map 2.

3.14. When tabling the draft law to approve the ratification of the 1891 Boundary Convention, the Dutch Ministers of Colonies and Foreign Affairs frankly admitted that...

> "the Dutch Government has never paid much attention to this outpost of its territory on the east coast of Borneo, which was unknown to her and moreover totally uninhabited; that the rights of the Sultan of Bulungan with regard to the disputed area cannot be called totally indisputable and, finally, that instead of a highly uncertain boundary through an unknown and almost inaccessible area, a very precisely described boundary has now been defined, which will dispense with all future difficulties, not only concerning that part of Borneo connected with the border dispute, but with regard to the entire island."[29]

3.15. The internal Dutch map attached to the Explanatory Memorandum itself clearly depicted the Dutch claim as stopping at Batu Tinagat.[30] The first draft of the internal map, as retrieved by Malaysia, does the same.[31] Indonesia fails to note that the boundary claimed by the Netherlands and depicted on these maps stops at Batu Tinagat.[32]

3.16. Furthermore, the internal Dutch map does not show Sipadan at all. Ligitan appears to be shown, but is unnamed and is located to the north of 4° 10'N. Hence, there is no question of this map (whatever its status) allocating the two islands to Bulungan or the Netherlands. Even the map produced as Annex 1 of the Indonesian Counter-Memorial, showing the territory alleged to have been relinquished by the Netherlands as a consequence of "the 1892 Convention", stops at Batu Tinagat.[33]

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[28] Count de Bylandt to Minister Hartsen of Foreign Affairs, 28 July 1889, extract in MM, vol. 3, Annex 47.

[29] Memorandum of Explanation, Proceedings States-General 1890-1891, no. 187, no. 3, p. 1: MM, vol. 3, Annex 51.

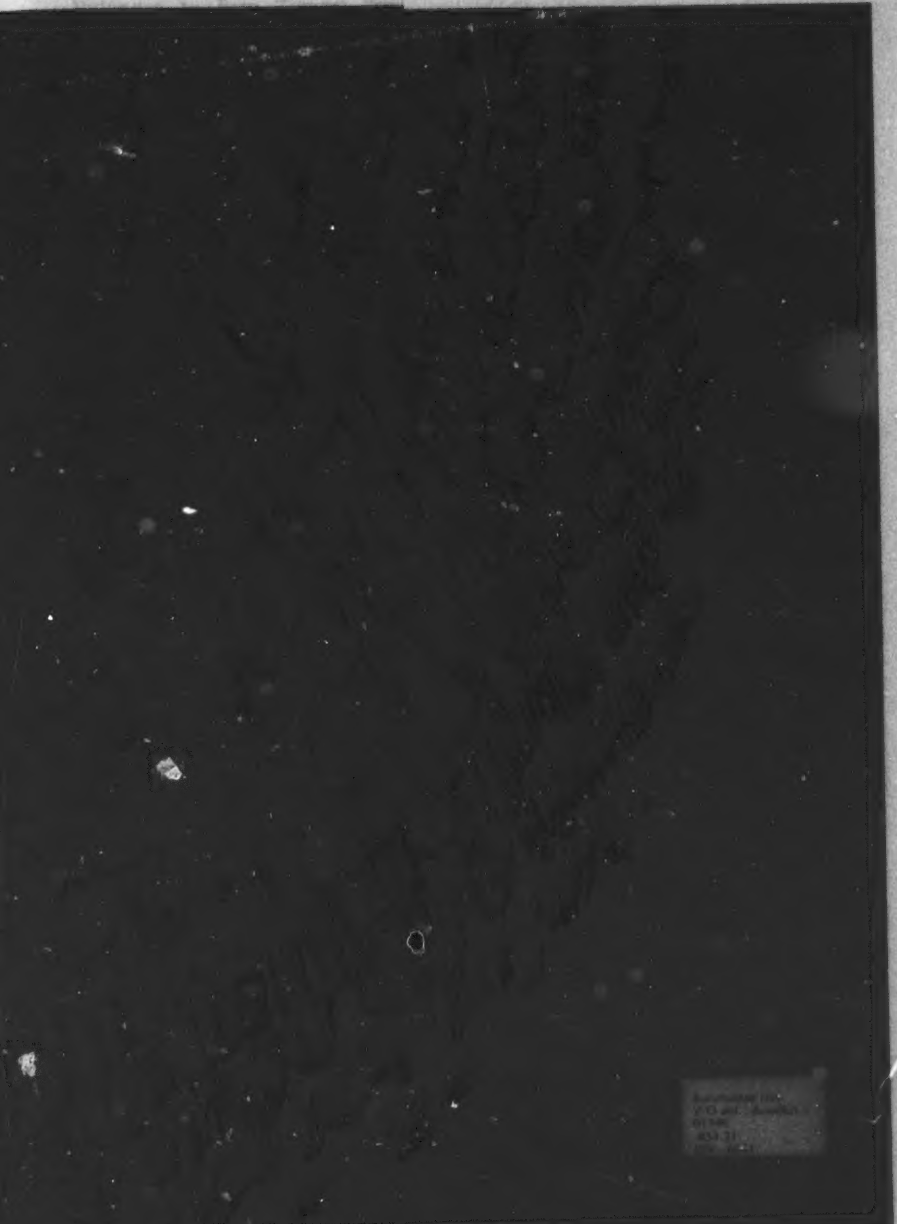
[30] MM, vol. 5, Map 2.

[31] MM, vol. 1, p. 98.

[32] See also IC-M, vol. 1, p. 78, para. 5.48.

[33] IC-M, vol. 2, Annex 1.

3.17 In sum, it was ev
Foreign Affairs during the reit



# Insert 5

## Sketch Map of East Borneo. Bulungan, 1930

(Scale 1:750.000)

3.17. In sum, it was wholly understandable that the Minister of Foreign Affairs during the ratification debate noted that the claims of Bulungan to Batu Tinagat "could not be proved and were in reality imaginary".[34] *A fortiori*, the Dutch authorities never presented any claim as to the islands around Darvel Bay. The Indonesian Counter-Memorial does not come up with a shred of evidence to the contrary. It takes great pains to explain that the 1891 Boundary Convention concerned islands as well as the mainland. But it does not produce a single statement, either during the negotiations or during the ratification debate, hinting at the extension of Dutch sovereignty over any islands situated off the British North Borneo coast.

## E. No Map includes Ligitan or Sipadan within Bulungan

3.18. Malaysia has submitted a number of maps of the Bulungan area prepared during the colonial era. These point unequivocally to the same conclusion. No matter whether they were prepared or issued under Dutch official auspices (e.g. the 1849 Versteeg map,[35] the *Island of Palmas* Survey Map of the Netherlands East Indies Archipelago, 1897-1904,[36] the hydrographical map of 1905 and its update of 1915[37] and the 1913 official Residence map[38]) or were published by private bodies,[39] and no matter whether they came before or after 1891, not one single map includes the two islands as part of the Sultanate of Bulungan. This is small wonder in view of the difficulties the sultans had in maintaining their authority over the mainland of Bulungan and in view of the merely latent interest of the Dutch in this particular area.[40]

3.19. Insert 5, on the following page, is a sketch map of Bulungan. Prepared in 1930, it clearly shows the contraction of the Sultanate. This confirms the weakness of the authority of the Sultans of Bulangan at the time. The northern boundaries of Bulungan appear to be at the river Sesajab, just north of the islands of Baru, Tarakan and Bunju, well south of Sebatik and the international boundary. Against this background, there could be no question of inclusion of Sipadan and Ligitan within the realm of Bulungan.

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[34] MC-M, vol. 1, p. 15, para. 2.16.
[35] MM, vol. 5, Map 3.
[36] MC-M, vol. 2, Map 1.
[37] MC-M, vol. 2, Maps 2 and 3.
[38] MM, vol. 5, Map 1.
[39] See e.g. the inaccurate 1901 map in the *Journal of the Royal Netherlands Geographical Society*, IC-M, vol. 2, Annex 1.
[40] See the expert study of Professor Houben, appended to MC-M, vol. 1.

## F. Occasional Dutch Naval Activities in the Area did not Involve Exercises of Jurisdiction or Claims to the Islands

3.20. Although the Dutch colonial administration of Bulungan spanned a period of nearly 100 years, Indonesia has so far failed to provide a single example of the actual exercises of jurisdiction by Dutch naval vessels off the coast of Northeast Borneo. Research by Malaysia in the archives of the Dutch ministries of Colonies, Navy and Foreign Affairs as well as in reports by colonial officers and the annual Reports on the Colonies provides no indication that any such activities actually took place. In view of the comprehensiveness of the Dutch colonial archives and their excellent state of preservation, any such exercise of jurisdiction would have been reported, and any such report would have survived. The only possible inference is that no relevant power in the region considered this part of the Sulu region to be under the Sultan of Bulungan or the Netherlands East Indies. Neither did the Dutch themselves take that view.

3.21. In its Counter-Memorial Indonesia reports on its search for Dutch administration. Obviously, Bulungan forces and officials itself never went out to sea since Bulungan was not a maritime power.[41] As far as the Netherlands is concerned, all Indonesia can submit is a one-page list of ships that cruised through this region during the period 1895-1928, as well as a few reports on instances of naval activities before that period.[42] Passing through or surveying a particular area, even if it is for the sake of combating piracy *jure gentium*, must not be confused with the exercise of territorial sovereignty. But that is what Indonesia does. In the *Island of Palmas* case, Arbitrator Huber succinctly stated that:

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State... Territorial sovereignty involves the exclusive right to display the activities of a State."[43]

Who could ever maintain that the occasional cruises of Dutch ships in this particular region meet the classical criteria of displaying exclusive authority?

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[41] J. Hageman, "Aanteekeningen omtrent een gedeelte der Oostkust van Borneo", in *Tijdschrift voor de Indische Taal-, Land- en Volkenkunde*, vol. 4 (1855), p. 78 reported that the Sultan of Bulungan did not even have "praus", i.e. local boats. See also Houben, MC-M, vol. 1, Appendix 1, para. 6.4.

[42] See IC-M, vol. 2, Annex 32.

[43] *Island of Palmas* case, in *Reports of International Arbitral Awards*, vol. 2, p. 829.

3.22. Scattered examples of a Dutch boat getting a view of Sipadan (Ligitan is rarely mentioned) cannot be regarded as serious examples of Bulungan's or for that matter the Netherlands' title. What do these few cases actually amount to?

3.23. Taking them in chronological order, the first was in 1876, when the HNLMS *Admiraal van Kinsbergen* steamed through the area, occasionally taking soundings and anchoring. The log does not more than mention that the ship "steamed ESE below Poeloe Sipadan", with no implication that the island was considered as part of Bulungan.[44] A landing took place on Mabul, not on Sipadan. Indonesia goes as far as to argue that this "shows that at the time the Dutch considered that the island [i.e., Mabul] belonged to the Sultan of Boeloengan",[45] but there is no suggestion in the record of this idea. Indonesia's argument is hardly advanced by its presentation of the relevant passage:

Original: *"Admiraal van Kinsbergen in Solozee, van Sesajab naar Kobong"*

Indonesia's version: "*Admiraal van Kinsbergen* on patrol off the coast of Boeloengan"

Correct translation: "*Admiraaal van Kinsbergen* in the Sulu sea, from Sesajab to Kobong"

3.24. The next event was nearly three decades later and concerned the surveying activities by HNLMS *Macasser* in 1903.[46] In its Counter-Memorial Indonesia takes issue with "the Malaysian interpretation of the report by the commanding officer, i.e. that he appeared to treat all islands mentioned (including Sipadan and Ligitan) as being part of British North Borneo".[47] However, Malaysia simply reports, as it did in the *Admiraal van Kinsbergen* case, what is in the detailed report by Commanding Officer Van Straaten on his activities in "British North-Borneo, 21-27 October 1903".[48] Indonesia notes that the survey of the *Macasser* resulted in the 1905 map on the "East Coast of Borneo: Island of Tarakan up to Dutch-English Boundary". Yet the Dutch-British boundary line stops on this map in accordance with the 1891 Convention at the east coast of Sebatik.[49] The position is exactly the same on the 1915 updated version of the map, to which Indonesia refers in rather general terms in its Counter-Memorial.[50]

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[44] IC-M, vol. 2, Annex 12.
[45] IC-M, vol. 1, p. 34, para. 3.67.
[46] See MM, vol. 1, pp. 74-75, paras. 7.5-7.6; vol. 3, Annex 64.
[47] IC-M, vol. 1, p. 137, para. 7.50.
[48] See MM, vol. 3, Annex 64.
[49] As reported in MC-M, vol. 1, p. 103, para. 5.14.

3.25. Indonesia also relies on a 1910 patrol of the HNLMS *Koetei* in St. Lucia Bay. This ship indeed cruised south of Sipadan and caught sight of the island on 30 September 1910.[51] Indonesia fails to mention that when reporting on its surveying activities in the neighbourhood of East Nunukan and Sebitik on 27 September 1910, the logbook notes the ship's arrival in the waters "at boundary line", where the *Koetei* anchored and where it was decided who would be in charge of the watch.[52] Subsequently, the *Koetei* passed the Anglo-Dutch border and patrolled St. Lucia Bay, including the area near Sipadan, Mabul and Omadan on 30 September. On the very same day it arrived at Lahad Datu where the logbook reports an "official visit of British civil authorities" (which Indonesia did not see fit to include in its translation of the log of 30 September 1910).[53] Obviously, the case of the *Koetei* is another example of confusing the patrolling and the surveying of an area with exercising State jurisdiction.

3.26. The last event in the "series" is what Indonesia in its Counter-Memorial depicts as "the highly significant *Lynx* expedition" of November 1921.[54] The *Lynx* was engaged in combating piracy, and was pursuing a suspect fleet of 30 praus. It put a boat ashore on Sipadan seeking information of their whereabouts. Subsequently it went to Si Amil, where the praus could be seen from a considerable distance. But jurisdiction over pirates cannot be exercised within territorial waters, hence it stayed outside the three mile limit. This was no implied contrast with its conduct on Sipadan but a reflection of the limits on its competence to arrest in British waters. In fact the British authorities at Tawao were happy to help, offering to accompany the *Lynx* back to Si Amil.[55] But the Dutch authorities at Tarrakan thought it unnecessary to pursue the matter further, the pirate fleet being so far from Dutch territory.[56] The incident has nothing to do with Dutch territorial jurisdiction over any islands whatever.

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[50] IC-M, para. 7.50. The 1905 map and its 1915 update are reproduced in MC-M, vol. 2, Maps 2 and 3.

[51] See the extract of the logbook and its translation in IC-M, vol. 2, Annex 33.

[52] See Annex MR 2.

[53] IC-M, vol. 2, Annex 33 includes this particular information on the last page, Folio 196, of the extract of the logbook of the *Koetei* for 30 September 1910 at the middle of the page. In translation the relevant part reads: "Sea-watch of Friday 3 September 1910. 2.30 hrs. Peeling potatoes. Patching and sewing. 4 hrs. Fixing. 4.30. Tea water. Receive official visit British civil authorities. 5.55 hrs. At sunset lowering the flag."

[54] IC-M, vol.1, pp. 81-82, para. 7.51.

[55] See IM, vol. 4, Annex 120.

[56] Ibid.

3.27. The voyage did, however, give rise to extensive discussions among the Dutch authorities as to the existence of a maritime boundary east of Sebatik.[57] The Dutch authorities were clearly of the view that none had been established so far. Vice-Admiral Umbgrove, Commander of the Naval Forces and Head of the Department of Navy in the Netherlands Indies, reported on 4 January 1922 that:

> "In the convention concluded between the British and Dutch Governments (see Decree of the Governor-General, included in *Staatsblad* 1916 No. 145) concerning the boundary line between the Netherlands and the British protectorate on Borneo no boundary line is set forth which separates the territorial sea of the Netherlands and the protectorate in question."[58]

3.28. Out of caution, the Vice-Admiral had instructed the Commander of the *Lynx* to "consider the prolonged land boundary to be the northern boundary [in] the territorial sea of Sebatik", he subsequently preferred a line perpendicular to the coast.[59] In his letter of 10 December 1922 to the Minister of Colonies, the Governor-General of the Netherlands East Indies the Governor-General supported this solution as "the fairest and most defensible".[60]

3.29. The internal Dutch map of 1891 was also referred to in these Dutch deliberations, but the Head of the Legal Department of the Netherlands' Ministry of Foreign Affairs advised: "As far as I could ascertain, this map does not result from actual consultation between the Netherlands and Great Britain".[61] Hence, in his view the Netherlands would be free to opt for a perpendicular line, to be constructed on the eastern coast of Sebatik in a much more northern direction. Not a single reference in these well-documented five-year long Dutch internal deliberations were made to any impact on a claim to Ligitan and Sipadan. This was simply because at the time the Dutch made no such claim at all. The fact is that the Dutch preferred a maritime delimitation between Dutch and British waters according to a line perpendicular to the coast line of Sebatik. Of an allocation line along the 4°10'N parallel there is no trace.

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[57] MM, vol. 1, pp. 81-82, paras. 7.15-7.16; MC-M, vol. 1, pp. 73-80, paras. 4.8-4.18.

[58] Text in ARA, *Min. of Col.*, 2.10.36.04, inv. No. 2495; Annex MR 4.

[59] See MC-M, vol. 1, pp. 74-80.

[60] MC-M, vol. 2, Annex 4.

[61] Memorandum with attachments, Legal Department, Netherlands' Ministry of Foreign Affairs, 8 August 1923: MC-M, vol. 2, Annex 5.

3.30. These few examples can be supplemented with the information which the logbooks of other ships provide. For example, when the *Soembing* patrolled in October 1891 in Bulungan its Commander reported that "with the arrival at the passage between East Nanukan and Sebatik" the ship had reached "the outer limit of our territory".[62] Subsequently, the ship started its return journey.

3.31. Intensive scrutiny of Dutch naval activities by both Indonesia and Malaysia presents the Court with a mere half dozen instances of Dutch ships patrolling off the coast of North-East Borneo. None of these instances amounts to a display of authority over territory or an exercise of territorial jurisdiction. They provide no evidence for Indonesia's claim to sovereignty over the two islands.

## G. Conclusion

3.32. In sum, in all the documents under review in this Chapter there is not a single sentence, phrase or word which involves a claim on the part of the Sultan of Bulungan or the Dutch authorities to the east of Batu Tinagat or to offshore islands off Darvel Bay. Nor is anything reported to that effect in the Dutch Annual Reports on the Colonies, in other official colonial documents such as mail reports or memoranda of transfer by local Residents, or in travel accounts. The cupboard of Dutch claims to the islands is completely bare.

3.33. For all these reasons, it can be conclusively stated that the islands of Ligitan and Sipadan were never under the authority of the Sultanate of Bulungan and that the Netherlands at no time advanced claims to territory east of Batu Tinagat, or to off-shore islands of Borneo eastwards of the island of Sebatik.

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[62] Text in ARA, *Min. of Navy*, 2.12.01, inv. 2703, p. 11. See Annex MR 3.

# Chapter 4

# No Title to the Islands can be based on the 1891 Boundary Convention

## A. The 1891 Boundary Convention addresses the Land Boundary in Borneo Exclusively

4.1. Indonesia still considers that the 1891 Boundary Convention fixed a boundary allocating distant islands between the two Parties, even though it does not now rely so heavily on the Boundary Convention as the sole or even main basis of its title to Sipadan and Ligitan.[1] The Indonesian Counter-Memorial offers no new evidence to support the contention and reads into the Convention words that just are not there.

4.2. The actual text of the Convention addresses the issue of the land boundary, exclusively. Malaysia has already examined questions relating to the interpretation of the text of the Boundary Convention and respectfully refers the Court to its Memorial (vol. 1, Chapter 8, pp. 87-95) and Counter-Memorial (vol. 1, Chapter 2, pp. 9-49).

4.3. The Indonesian Counter-Memorial correctly points out that:

> "It is relevant that the original proposal which led to the 1891 Convention was based on agreement that, if the coastal boundary point could be agreed, then the two Governments would;

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[1] IM, vol.1, p. 3, para. 1.11: "... the differences of opinion between the British and Dutch authorities concerning the extent of their respective jurisdictions were resolved by the 1891 Convention."; IM, vol. 1, p. 98, para. 5.69: "It follows that *title to the islands now in dispute was settled in favour of The Netherlands*, and now (by way of succession) in favour of Indonesia, by virtue of the treaty settlement embodied in the 1891 Convention." To be compared with IC-M, vol. 1, p. 5, para. 2.1: "The basis of Indonesia's sovereignty over Pulau Ligitan and Pulau Sipadan is straightforward. Indonesia inherited its title from The Netherlands, whose *title over the islands was confirmed* by the 1891 Anglo-Dutch Convention." (Emphasis added.)

> 'proceed without delay to define, short of making an actual survey, and marking the boundary on the spot, *the inland boundary-lines*...'."[2]

Right from the inception of the agreement, it was agreed that the Boundary Convention should address solely the issue of inland boundary-lines, as Sir Philip Currie noted on 16 July 1889 at the first meeting of the Joint Commission.[3]

4.4. The text of the Convention confirms this initial agreement. The Boundary Convention is designated as a "Convention between Great Britain and The Netherlands defining Boundaries *in* Borneo".[4] The preamble states that the two Parties, "being desirous of defining the boundaries between the Netherland possessions *in the Island of Borneo* and the States in that island which are under British protection, have resolved to conclude a Convention to that effect".[5]

4.5. Article I adds: "The boundary between the Netherland possessions *in* Borneo and those of the British-protected States *in the same island*, shall start from 4°10' north latitude on the east coast of Borneo."[6] Article IV states: "From 4°10' north latitude on the east coast the boundary-line shall be continued eastward along that parallel, across the Island of Sebittik: *that portion of the island* situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to the Netherlands."[7] As was previously explained, the Island of Sebatik was specifically included in the delimitation in order to ensure access to the rivers in mainland Borneo. Sebatik is little more than one nautical mile off the mainland, well within the three-mile limit of territorial waters then accepted by both Parties. The delimitation itself concerns allocation of "portions" of the island to the two Parties. No mention is made anywhere in the treaty of other islands or of any maritime delimitation.

4.6. The Indonesian Counter-Memorial does try to contrast Article IV with Article III, which stipulated a terminal point for the line by providing that the boundary should follow a certain route "to Tandjong-Datoe on the west coast of Borneo".[8] It comments: "No equivalent terminal point was stipulated in Article IV for the eastward continuation of the line".[9] Malaysia considers that the terms used by the boundary convention for the eastern end of the boundary, i.e. "across the Island of Sebittik", are just as clear and "terminal" as those used for the western coast. Moreover, the 1915 Agreement starts the boundary from the east coast of the island of Sebatik and describes its course westward:

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[2] IC-M, vol. 1, p. 99, para. 5.102 (emphasis added).

[3] IM, vol. 1, p. 70, para. 5.18.

[4] IM, vol. 3, Annex 75 (emphasis added).

[5] Emphasis added.

[6] Emphasis added.

[7] Emphasis added.

[8] IC-M, vol. 1, p. 65, para. 5.21.

> "(1) Traversing the island of Sibetik, the frontier line follows the parallel of 4° 10' north latitude..."

A starting point is a terminal point in reverse.

## B. No Maritime Boundary was considered at the time by the Parties

4.7. The Parties to the 1891 Boundary Convention never contemplated any sort of maritime boundary or any prolongation of the 4° 10' N parallel out to the sea. At the turn of the 19th century, the distinction between maritime boundaries and allocation lines was well established in international law.[10] Neither was proposed and agreed by the parties. The Indonesian Counter-Memorial does not come up with any fresh evidence to the contrary. The negotiations and parliamentary debate do not indicate any awareness of a problem of that nature. The internal Dutch map is the only suggestion of a possibility of an extension of the boundary beyond the land boundary of the islands of Borneo and Sebatik. Malaysia will return to that specific issue later (see below, section D).

4.8. Maritime delimitation was not a usual clause in boundary treaties at the time. The generally accepted three-mile limit of territorial waters did not call for complex delimitation off shore. In case of adjacent territorial waters, equidistance, i.e. in most cases the line perpendicular to the coast, would generally solve any difficulties. And opposite stretches of land were generally further apart than twice the breadth of territorial waters. The rare maritime delimitation agreements of the time concerned Europe, America and Africa. None were signed in South-East Asia.[11]

4.9. The Indonesian Counter-Memorial does try to make something out of a cruise of HNLMS *Admiraal van Kinsbergen* in 1876 in the vicinity of the island of Mabul. The cruise is presented as an "incident". It has been examined above.[12] As the cruise went unnoticed by the British North-Borneo authorities, it hardly qualifies as an incident. It was part of the general effort of both British and Dutch authorities to combat piracy in the region and can certainly not be construed as a claim to sovereignty on Mabul or the other islands in the vicinity. No mention of the *Admiraal van Kinsbergen* or of Mabul appears in the lengthy negotiations and diplomatic correspondence that led to the 1891 Boundary Convention. If there had been any incident, or any claim to sovereignty, it would certainly have surfaced at that time.

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[9] Ibid.

[10] See below, paragraph 4.22 and ff.

[11] Sang-Myon Rhee, "Sea Boundary Delimitation between States before World War II", *A.J.I.L.*, 1982, vol. 76, pp. 555-588; D.W. Bowett. *The Legal Regime of Islands in International Law*, 1979, pp. 300-311.

4.10. The only new elements advanced in support of a maritime delimitation are a certain number of sketches and maps which show a line traced along the 4° 10' N parallel. They are completely misread by the Indonesian Counter-Memorial. True, the line traced by Count de Bylandt does show a pencil line running eastward along the 4° 10' N parallel out to the margin of the map.[13] Unfortunately for Indonesia's case, it also runs out *westward* to the other margin of the map, and that never was a boundary proposal contemplated by Count de Bylandt. The simple truth is that Count de Bylandt used a pencil and ruler to trace the 4° 10' N parallel right across the map. The same is true of the Dutch map reporting the proposal by Admiral Mayne. Here again, the 4° 10' N line extends eastward to the margin of the map, but also westward deep into mainland Borneo, which never was a boundary line contemplated by the Admiral.[14]

4.11. Indonesia places great stress upon the map attached by Lt. Cmdr. R. Posthumus Meyjes to the paper published in 1901 in the Journal of the Royal Netherlands Geographical Society.[15] The "Grenslijn", indicated in bold red, runs along the 4° 10' N parallel, to the edge of the map, which ends well before reaching Sipadan or Ligitan. But here again, the red line runs west as well as east, in clear contradiction with the terms of the 1891 Boundary Convention. Article II of the Convention states that "The boundary line shall be continued westward from the 4° 10' north latitude, *and follow a west-north-west direction*, between the Rivers Simengaris and Soedang..."[16] The line clearly described by the Convention is in no way a parallel. In any event Lt. Cmdr. Meyjes seems quite uncertain as to the 1891 Boundary Convention itself. On the map, the legend describes the boundary in the following terms:

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[12] See above, para. 3.23.

[13] The map appears in IC-M, vol. 1, p. 87, para. 5.70 and vol. 2, Annex 22.

[14] IC-M, vol. 1, p. 88, para. 5.71 and vol. 2, Annex 23.

[15] IC-M, vol. 1, p. 92, para. 5.84 and vol. 2, Annex 1.

[16] Emphasis added.

> "Boundary line (with landmarks) adopted by the Convention of 1892 between The Netherlands and British North-East Borneo."[17]

The confusion is patent. There never was any boundary convention dated 1892 or signed by the Netherlands with British North-Borneo. The error as to the description of the *Grenslijn* is more serious. Such a contradiction with the terms of the Convention disqualifies the Map as an accurate depiction of the 1891 boundary.

4.12. Maritime delimitation by prolongation of a land boundary was not a feature of State practice at the time and has never since been considered as a rule of international law.[18] State practice is very variable.[19] Courts and arbitral tribunals have been reluctant to accept prolongation of the land boundary. In the *Grisbadarna* case, the Permanent Court of Arbitration refused to consider prolongation of the land boundary for the purpose of maritime delimitation. It hinted at the possibility of a line perpendicular to the coast.[20] In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, the Court rejected the Libyan argument of prolongation of the land boundary. It stated:

> "85. The Court regards the 1910 Convention as important for the consideration of the present case, because it definitively established the land frontier between the two countries. The Court is however not able to accept the suggestion based upon it in the Libyan Memorial that the 'boundary on the seaward side of Ras Adjir would continue, or would be expected to continue' in the northward direction of the land frontier."[21]

4.13. As judge *ad hoc* Evensen pointed out:

> "Another difficulty encountered in attempts to project a land boundary seawards in plainly apparent in the present case. *What segments of the land boundary shall have a bearing on the direction of the seaward projection?* Land boundaries are frequently irregular for a number of reasons. A land boundary

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[17] IC-M, vol. 2, Annex 1. The original text in Dutch reads: "*Grenslijn (met grensteekens) bij tractaat van 1892 aangenomen tusschen Nederlandsch en Britsch Noord-Oost Borneo.*"

[18] For a review of early practice by the Dutch authorities, see MC-M, vol. 2, Annex 5.

[19] D. Bardonnet, "Frontières terrestres et frontières maritimes", *A.F.D.I.*, 1989, pp. 22-38.

[20] *R.I.A.A.*, vol. XI, pp. 147-166 at pp. 159, 160.

[21] I.C.J. Reports 1982, p. 66, para. 85.

> **has minor and major curvatures, often a host of different directions along the various parts of the boundary. Is it solely the last segment of the land boundary ending in the terminal point of the coast that is relevant? How large must this segment be to count in order to project a dividing line perhaps over very extensive maritime areas? Or should such a projection be drawn from the average direction of the whole border? It seems to follow that at least in the present case as in a number of others, the seaward projection of the land boundary would be a rather haphazard element to introduce as a criterion for drawing the line of delimitation."[22]**

**4.14. In the *Gulf of Maine* case, the Chamber of the Court declined to grant any significance to political geography for the purpose of maritime delimitation. It declared:**

> **"Political geography has been employed solely for the purpose of noting the location within the area in question of the international boundary terminus."[23]**

**The Chamber did not take into account the direction of the land boundary to determine the maritime delimitation. Quite to the contrary, it noted:**

> **"it is hard to imagine a case less conducive to the application of [the coastal perpendicular] method of delimitation than the *Gulf of Maine* Case, in which the starting point of the line to be drawn is situated in one of the angles of the rectangle in which the delimitation is to be effected."[24]**

**4.15. The problem of delimitation east of Sebatik is not without some resemblance to the *Gulf of Maine* configuration, with a starting point situated in the angle of a rectangle. Any maritime delimitation — the same is true of an allocation line — departing from equitable considerations would certainly call for a very explicit agreement between the Parties, which is not the case here.**

**4.16. The Dutch authorities themselves were convinced that there was no rule of international law in the matter and that the 1891 Boundary Convention did not extend out to the sea. The thorough internal Dutch discussions of the 1920s on maritime delimitation off Sebatik certainly prove**

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[22] **ICJ Reports 1982, p. 309, para. 21.**

[23] **ICJ Reports 1984, para. 42.**

[24] **Ibid.**

the point. They have been examined at length in the Malaysian Counter-Memorial.[25] But a recently discovered letter sheds some new light on the position of the Dutch authorities and, incidentally, on the cruise of the *Lynx*.[26]

4.17. In 1922, the Dutch Navy called for a boundary line delimiting territorial waters east of Sebatik. All Dutch services concerned considered that the boundary had not been delimited beyond the east coast of Sebatik. Vice-Admiral Umbgrove, Commander of the Naval Forces and Head of the Department of Navy in the Netherlands Indies had given temporary instructions to the Commander of the *Lynx*, in charge of control of the Dutch territorial waters and search for Bajau fleets. Umbgrove decided that the Commander should consider the prolonged land boundary to be the northern boundary in the territorial waters surrounding Sebatik.

4.18. Umbgrove fully realised that no boundary line had been set forth by the 1891 Convention. He submitted the question to the Governor-General in the following terms:

> "May I be allowed to raise in this context one other matter which according to me deserves to be addressed. In the Convention concluded between the British and Dutch Government (see Decree of the Governor-General, included in *Staatsblad* 1916 N° 145) concerning the boundary line between the Netherlands and the British protectorate on Borneo no boundary line is set forth which separates the territorial sea of the Netherlands and the protectorate in question.
>
> When searching for Bajau fleets near Tarakan it was as a matter of course necessary that the Commander of HM Lynx was familiar with the course of the boundary. At that time I have decided that he should consider the prolonged land boundary to be the northern boundary [in] the territorial sea of Sebatik.
>
> Yet it occurs to me that this matter which shows some similarity with the question how the course of the boundary should be in the Wielingen, should be settled in definite terms. Also in cases of maintenance of neutrality an unsettled situation can not be accepted in view of the great interest of St Lucia bay (petroleum fields).

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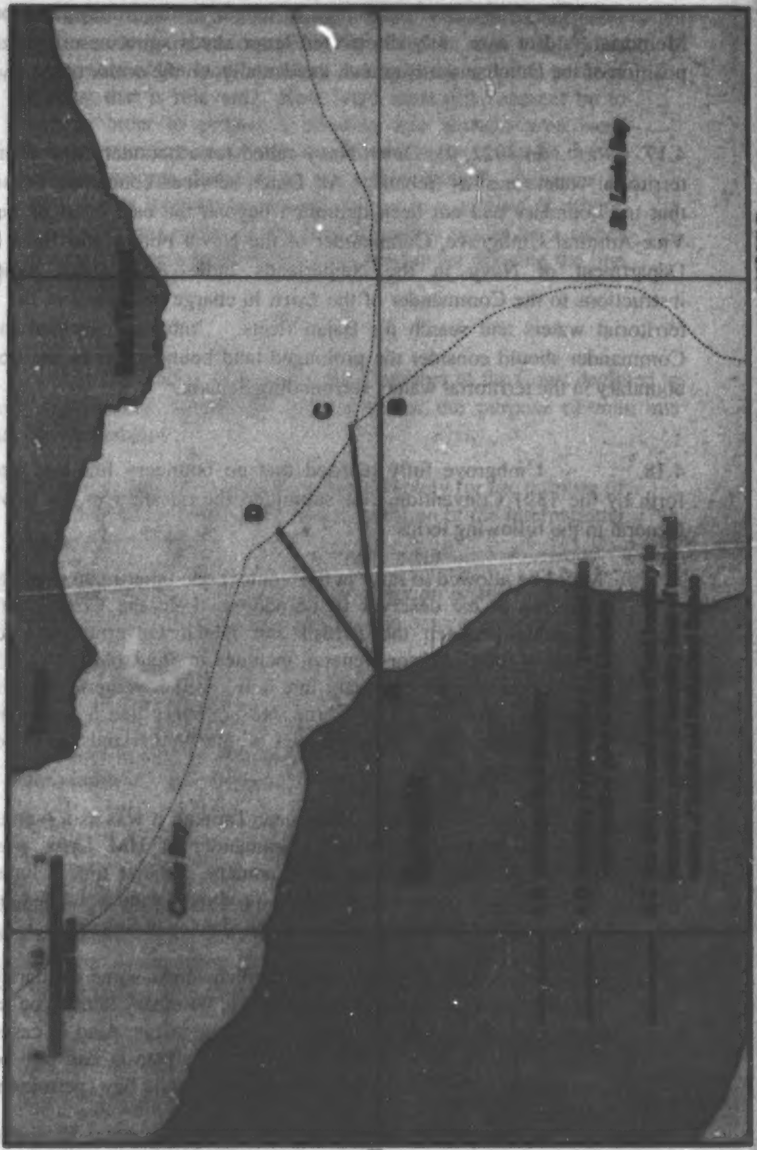
[25] MC-M, vol. 1, pp. 74-80, paras. 4.10-4.18; vol. 2, Annexes MCM-4-8.

[26] Indonesia refers to the letter in the heading of its Annex, IM, vol. 4, Annex 120, but fails to produce the text of the letter.

Insert 6

Boundary Lines referred to in letter Commander Naval Forces, 9 August 1922



> Hence I may give your Excellency into consideration to propose the supreme administration to take steps to supplement the treaty in question to that effect."[27]

4.19. Subsequently the question was examined by the Navy, the Governor-General of the Netherlands East Indies, the Minister of Foreign Affairs and the Minister of Colonies. The Navy was not in favour of a line running out to sea for three miles following the 4° 10' N parallel (line A-B), but in favour of a line perpendicular to the coast (line A-D), as shown as Insert 6 opposite.[28] The Legal Department of the Ministry of Foreign Affairs examined the doctrine and jurisprudence on the question. It considered that both solutions were admissible and that "it was not a question for international law to decide".[29] After careful consideration, the Minister of Colonies decided in 1926 not to press the point with the British authorities. The matter could be left in abeyance.[30]

4.20. The Dutch authorities would not have risked jeopardising a claim to Sipadan and Ligitan by pressing for a line perpendicular to the coast of Sebatik Island if they had thought Dutch sovereignty over the islands was at stake. A perpendicular line delimiting territorial waters obviously would have made more difficult a claim to a 4° 10' N parallel allocation line of distant islands. The concerned Dutch authorities would at least have given careful consideration to the matter on the basis of the report of the *Lynx* cruise, which had been forwarded to the Vice-Admiral and to the Governor-General. But the issue just was not considered during the years of internal Dutch debate.

4.21. The Dutch authorities thus clearly concluded in 1926 that no maritime delimitation concerning territorial waters, let alone an allocation line, had been decided between the Netherlands and Britain in 1891 or later. They further considered that no rule of international law called for prolongation of the 4° 10' N land boundary beyond the east coast of Sebatik and certainly did not favour such an outcome, which they considered contrary to Dutch interests. Finally, they concluded it was not worth taking up the issue with the British authorities.

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[27] Letter of the Vice-Admiral to the Governor-General of the Netherlands Indies, 4 January 1922, Annex MR 4.

[28] MC-M, vol. 1, p. 75, para. 4.12.

[29] MC-M, vol. 2, Annex 5.

[30] MC-M, vol. 2, Annex 8.

### C. No Allocation Line was drawn by the 1891 Boundary Convention

4.22. If maritime delimitation agreements were scarce at the end of the 19th century, the notion of allocation lines was well known. As Mervyn Jones defined them:

> "Lines of allocation are delimited through the high seas or unexplored areas for the purpose of allocating lands without conveying sovereignty over the high seas."[31]

4.23. International law makes a clear distinction between maritime delimitation and allocation lines. Boggs remarks:

> "Most lines in water areas which are defined in treaties are not boundaries between waters under the jurisdiction of the contracting parties, but a cartographic device to simplify the description of the land areas involved."[32]

4.24. The distinction between maritime delimitation and allocation lines was at the heart of the decision of the Tribunal in *Guinea/Guinea Bissau: Dispute Concerning Delimitation of the Maritime Boundary*.[33] In that case, one of the major questions was whether an allocation line clearly set by the relevant Convention was also considered to be a maritime delimitation. The Tribunal considered that the Convention of 12 May 1886 was concerned essentially with land possessions. As it noted:

> "In another respect, it seems to the Tribunal that the main purpose of the Convention was the distribution, cession (Art. VI), exchange or eventual occupation (Art. IV) of territories, and that delimitation was but one aspect or one means of distribution of territories which were never mentioned as possibly being maritime."[34]

4.25. Contemporary practice was well established in 1891. Britain and the Netherlands were used to such a form of delimitation. Britain had drawn an allocation line separating its possession from those of the United States in the sector of Passamaquoddy Bay as early as the 18th century by the Treaty of Paris of 3 September 1783, Article II.[35] It had, more recently, done so with France by the Convention of 28 June 1882 delimiting the respective possessions of the two Parties on the west coast of Africa, north of Sierra Leone.[36] In Southeast Asia, China and France signed a Boundary Convention on 26 June 1887 delimiting their respective possessions between Tonkin and China and drawing an allocation line relating to the islands.[37]

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[31] JM Jones, *Boundary-Making. A Handbook for Statesmen, Treaty Editors and Boundary Commissioners*, Washington, Carnegie Endowment for International Peace, 1945, p. 149.

[32] "Delimitation of Seaward Areas under National Jurisdiction", *A.J.I.L.*, 1951, vol. 45, p. 240, note 2.

[33] ILM, 1986, vol. 25, pp. 251 and ff.

[34] Ibid., para. 56, p. 279.

4.26. In the years following the 1891 Boundary Convention, quite a few conventions drawing allocation lines in south-east Asia were concluded. China signed the Convention of 9 June 1898 with Britain extending Hong Kong territory.[38] The United States signed the Treaty of Paris with Spain on 10 December 1898.[39] And of course the United-States and Britain signed the 2 January 1930 Convention relating to the boundary between the Philippines and North Borneo.[40] Examples abounded. Had the Parties so wished, they could have drawn an allocation line. And they would have said they were doing so.

4.27. Explicit allocation is the rule. All the examples mentioned by the Indonesian Counter-Memorial[41] draw explicit allocation lines. Not one simply suggests an allocation through prolongation of a land boundary.

4.28. The Indonesian Counter-Memorial cites the Sultan of Sulu's grant to Dent and Overbeck on 22 January 1878. In fact this was not a case of an actual line but rather a distance criterion for the allocation of territories. For present purposes what matters is that the element of allocation was explicit. The grant *explicitly* includes:

> "... all the other territories and coast ands to the southward thereof on the coast of Darvel Bay as far as the Sibuku River together with all the islands included therein within nine miles of the coast."[42]

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[35] De Martens, Recueil des Traités, t. III, pp. 553-559.
[36] British & Foreign State Papers, vol. 77 (1885-1886) pp. 1007-1012.
[37] IC-M, vol. 2, Annex 18.
[38] U.S. Department of State, China-Hong-Kong Boundary n° 13, 5 April 1962.
[39] Martens, NRG, 2ème série, vol. 32, p. 74.
[40] IM, vol. 4, Annex 123.
[41] IC-M, vol. 1, pp. 62-63, paras. 5.12-5.14.
[42] MM, vol. 2, Annex 9.

4.29. The Convention of 26 June 1887 between France and China *explicitly* provides:

> "2. ... The islands which are east of the Paris meridian of 105° 43' east (108° 3' east of Greenwich), that is to say the north-south line passing through the eastern point of the island of Tch'a Kou or Ouan-Chan (Tra-co), which forms the boundary, are also allocated to China. The island of Gotho and other islands west of this meridian belong to Annam."[43]

4.30. The Treaty of Paris of 10 December 1898 between Spain and the United States *explicitly* declares:

> "Article III. Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line:
>
> A line running from west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi..."

4.31. The Convention of 2 January 1930 between Britain and the United States *explicitly* declares:

> "It is hereby agreed and declared that the line separating the islands belonging to the Philippine Archipelago on the one hand and the islands belonging to the State of North Borneo which is under British protection on the other hand shall be and is here established as follows: ..."[44]

4.32. Likewise, the Convention of 12 May 1886 between France and Portugal cited in the Guinea/Guinea Bissau arbitration *explicitly* drew an allocation line for purpose of determining territorial sovereignty over islands. Article IV, paragraph 2 stated:

> "Shall belong to Portugal all the islands located between the Cape Roxo meridian, the coast and the southern limit represented by a line which will follow the thalweg of the Cajet river, and go in a southwesterly direction through the Pilot's Pass to reach

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[43] IC-M, vol. 2, Annex 18.

[44] MM, vol. 2, Annex 29, Art. I.

> 10°40' north latitude, which it will follow up to the Cape Roxo meridian."[45]

4.33. The point is that all the treaties mentioned *explicitly* purport to apportion maritime areas or to allocate islands. If such had been the intention of Great Britain and the Netherlands in 1891, no doubt they would have said so. A specific delimitation of possessions was possible, but it would have been qualified as such. No such delimitation was contemplated by the Parties in 1891 or the following years. They certainly did not consider allocation of sovereignty over distant islands — beyond the area of the dispute — was one of the purposes of the Boundary Convention. To read into the 1891 Boundary Convention a clause comparable to the explicit clauses included in the aforementioned treaties is an act of mere imagination.

## D. The Internal Dutch Map was not "Officially Communicated" to the British Government nor "Promulgated" by the Dutch Authorities: it was not an Agreement or an Instrument "accepted by the other party and related to the treaty"

4.34. Indonesia insists on communication of the internal map by the Dutch authorities to Britain. The Counter-Memorial repeatedly declares that map was officially communicated to the British authorities:

> "... a map that was forwarded to Great Britain and which did not provoke any adverse reaction."[46]

> "This map ...was communicated to the British authorities who raised no objection."[47]

> "...it was officially known to the British Government at the time in the context of the 1891 Convention."[48]

> "The production of the Map as part of that process was thus an official and public act of the Dutch Government in the application of the Convention, known to and acquiesced in by the British Government."[49]

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[45] ILM, 1986, vol. 25, p. 274, para. 45.

[46] IC-M, vol. 1, p. 51, para. 4.22.

[47] IC-M, vol. 1, p.145, para. 7.73.

[48] IC-M, vol. 1, p.71, para. 5.32.

[49] IC-M, vol. 1, p.78, para. 5.48.

4.35. **Indonesia thus tries to convey the impression that the internal map was officially communicated to the British Government and was acquiesced in by the British authorities. Again this is pure invention. There is no trace, either in the British archives or in the Netherlands archives, of any communication by the Dutch Government to the British Government of the internal map. In the absence of any such official communication, the map did not call for any particular reaction.**

4.36. **Moreover, the map did not indicate any allocation of Sipadan and Ligitan to the Netherlands. The red line stops at "P. Maboel" and is not drawn as far as Ligitan. Knowledge of the geography of the vicinity at the time did not allow for any claim on the islands by the Netherlands. The contemporary Sailing Directory published in London in 1890 shows Ligitan at 4°12 ½' N, well north of 4° 10' N parallel.[50] As for Sipadan, it does not show on the map at all. If the negotiators knew about the existence of Ligitan and Sipadan, they could not imagine that they were affected by an eventual maritime delimitation along the 4° 10' N parallel. The two islands could not have been implicitly allocated to the Netherlands in these conditions, even if the internal Dutch map was considered as having any legal relevance.**

4.37. **Indonesia pretends the internal map annexed to the explanatory memorandum was an agreement, "constituted by the official and public promulgation of the Explanatory Memorandum Map".[51] The expression used is intriguing. "Promulgation" is a precise procedure of introduction of treaties into domestic law.[52] It calls for a formal act by or on behalf of the head of State — generally a decree — and applies only to the text of the treaty as agreed, certainly not to *travaux préparatoires*, explanatory memoranda, parliamentary debates, etc.[53] There is no indication whatsoever of the promulgation, either by the Dutch or by the British authorities, of the internal map. In fact, the Dutch Constitution as revised in 1887, applicable at the time of the Boundary Convention, did not call for promulgation of treaties. Article 59 of the Constitution, provided that the King concluded and ratified all treaties, subject to approval by the States-General of treaties which entail a change in the State territory, impose financial obligations or contain any other provision relating to legal rights. Only as from 1953 did the Dutch** constitution come to include provisions on the promulgation of treaties.[34] The Indonesian Counter-Memorial gives no reference as to a procedure of promulgation. The lax wording is probably used here to shore up the legal importance Indonesia tries to bestow on the internal map.

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[50] MC-M, vol. 1, pp. 1-3.

[51] IC-M, vol. 1, p. 77, para. 5.47.

[52] C. Rousseau, *Droit international public*, t. I, Paris, 1970, para. 148, pp. 167-169; Carré de Malberg, *La loi, expression de la volonté générale*, Paris, 1931, pp. 166-173.

[53] On the Dutch practice before 1950 see A.M. Stuyt, *Formeel Tractatenrecht. Overzicht aan de hand van de Nederlandse praktijk*, The Hague, 1966, pp. 133-138.

4.38. The play on the word "official" by the Indonesian Counter-Memorial is quite misplaced. Sir Horace Rumbold and the British embassy staff followed the Dutch parliamentary debate in their professional capacity and reported to the Foreign Office in London. But it is not because the "officials" knew about the internal Dutch map that it was "communicated" to the British Government or "officially known" by the British authorities. At no moment during the negotiations or after signature or ratification of the Boundary Convention did any representative of the Netherlands officially call the attention of Great Britain to the internal map, let alone formulate any claim beyond the east coast of Sebatik. There certainly was no obligation to react to every piece of information picked up by a diplomat.

4.39. Indonesia quotes the Court in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)* case.[35] But the Doha minutes were negotiated by the respective authorities of the two Parties. The internal Dutch map was never produced during the negotiation with Great Britain or communicated for observations after signature of the Boundary Convention.

4.40. By no standards can the internal Dutch map be considered as an "agreement relating to the treaty" in the sense of article 31 (2) (a) of the Vienna Convention or as an instrument "accepted by the other parties as an instrument related to the treaty" in the sense of article 31 (2) (b) of the Convention, as alleged by Indonesia in its Counter-Memorial.[36] Oppenheim notes:

> "For this purpose [i.e. interpretation] the context of a treaty includes not only its text, preamble and annexes, but also any agreement relating to the treaty and made between all the parties

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[34] See Articles 65-66 of the Dutch constitution of 1953, revised in 1956. See on the various changes in the constitutional provisions on promulgation of treaties, J.G. Brouwer, *Verdragsrecht in Nederland. Een studie naar de verhouding tussen internationaal en nationaal recht in een historisch perspectief*, Zwolle, 1992 and H.H.M. Sondaal, *De Nederlandse Verdragspraktijk*, The Hague, 1986, pp. 203-221. See on the background and contents of the current parliamentary act of 1994 on approval and promulgation of treaties E.W. Vierdag, *Het Nederlandse Verdragenrecht*, Zwolle, 1995, pp. 98-102.

[35] IC-M, vol. 1, pp. 69-70, para. 5.29, p. 73, para. 5.39.

[36] IC-M, vol. 1, pp. 70-72, paras. 5.31-5.36.

> in connection with the conclusion of the treaty, and any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."[57]

4.41. The context must proceed from the consent of all the parties concerned, whatever the form and modalities of that consent.[58] Acceptance by all parties is essential. As the International Law Commission remarked in its report to the General Assembly:

> "The principle on which this provision is based is that a unilateral document cannot be regarded as forming part of the "context" within the meaning of article 27 unless not only was it made in connection with the conclusion of the treaty but its relation to the treaty was accepted in the same manner by the other parties."[59]

4.42. Indonesia does not produce the slightest evidence of British consent to the map either as embodying an agreement relating to the treaty or as an instrument related to the treaty. The internal Dutch map certainly does not qualify as part of the context of the 1891 Boundary Convention.

4.43. The comparison with the *Livre jaune* map considered in the *Libya/Chad* case does not resist examination. The *Livre jaune* map was considered by the Parties as part and parcel of the treaty arrangements. Annex I of the 1955 Treaty between France and Libya considered "the Franco-Italian agreements of 1902" as an international instrument in force for the purpose of delimiting the boundary. The exchange of letters constituting these agreements states that:

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[57] *Oppenheim's International Law*, 9th edition, 1992, vol. 1, pp. 1273-4. See also T.O.Elias, *The Modern Law of Treaties*, 1974, p. 75: "In other words, for a document to be regarded as forming part of the context of a treaty for the purpose of its interpretation, it must be the result of an agreement by all the parties to the treaty, must have been made in connection with the conclusion of the treaty and must be understood as such by all of them"; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn, 1984, p. 129; M. Yasseen, *RCADI*, 1976, III, vol. 151, p. 37; P. Reuter et P. Cahier, *Introduction au droit des traités*, 3e édition, 1995, p. 89-90, para. 144.

[58] "Cependant, la Convention de Vienne traduit une conception extensive de la notion de contexte, puisque, aux termes de son article 31, §2, celui-ci comprend outre l'ensemble du texte du traité, le préambule et les annexes ainsi que tout instrument 'ayant rapport au traité *accepté comme tel par l'ensemble des parties*', ce qui inclut bien sûr les accords interprétatifs, mais ne s'y limite pas." A. Pellet et P. Daillier, *Droit international public*, 6e édition, 1999, p. 258, para. 169.

[59] ILC Ybk., 1966, vol. II, part II, p. 221.

> "the limit to the French expansion in North Africa, as referred to in the above mentioned letter ... dated 14 December 1900, is to be taken as corresponding to the frontier of Tripolitania as shown on the map annexed to the Declaration of 21 March 1899."[60]

The Court concluded: "The map referred to could only be the map in the *Livre jaune* which showed a packed line indicating the frontier of Tripolitania."[61] In short, the *Livre jaune* map was explicitly referred to by the 1902 agreements and was thus considered by the Court as an instrument accepted by the parties to the main agreement. It was incorporated as an *instrumentum* to the 1955 treaty. There is nothing of the sort in the 1891 Boundary Convention. One can only conclude that:

> "In view of the absence of any map officially reflecting the intentions of the parties to the [1890] treaty and of any express or tacit agreement between them or their successors concerning the validity of a boundary depicted on a map ... the Court considers itself unable to draw conclusions from the map evidence submitted in this case."[62]

4.44. The Dutch authorities knew well that the internal map had no special authority and carried no legal weight. On 8 August 1923, the Minister of Foreign Affairs wrote to the Minister of Colonies. He noted:

> "Another circumstance in favour of extending the land border of Sebetik into the sea is a map, submitted with the bill mentioned above, on which the border between the areas under Dutch and British jurisdiction on land and sea is extended along the parallel 4°10'N. As far as I could ascertain, this map does not result from actual consultation between the Netherlands and Great Britain; however, I regard it as not impossible that that this map is known to the British Government."[63]

4.45. The Minister thus clearly admitted that the map had never been communicated to the British authorities. He went on to suggest the Government drop the idea of seeking a delimitation of the territorial waters, so as to avoid any "possible rebuff from the British Government."[64] His view was that the internal map had not settled the matter of delimitation off Sebatik and that there had been no agreement on the map.

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[60] ICJ Reports, 1994, para. 61.

[61] Ibid.

[62] ICJ Reports, 1999, *Kasikili/Sedudu*, para. 87. In the present case, there is an official map, annexed to the 1915 agreement, but none "officially reflecting the intentions of the parties" in 1891.

[63] MC-M, vol. 2, Annex MCM 5.

[64] Ibid.

## E. Subsequent Conduct, Practice and Agreements confirm that the 1891 Boundary Convention did not address the Issues of Maritime Delimitation and Allocation of Distant Islands

4.46. The negotiations leading to the 1915 Agreement and official map certainly provided the opportunity for both Parties to clarify the situation of the distant offshore islands if they had been of any concern. The state of geographical knowledge had progressed considerably since 1891, both on mainland Borneo and in chartering the surrounding waters and islands.[65] The British, Dutch and American naval surveys off North Borneo had in particular located very precisely the two islands of Pulau Sipadan and Pulau Ligitan, ignored or mislocated before 1891. The negotiations leading to the 1915 Agreement presented a unique opportunity to allocate the islands to one or the other Party if they so decided. Commissioners had been appointed. An official map was prepared, signed by the four Commissioners and annexed to the Agreement. It would have been quite simple to draw the allocation line on the map and to locate the islands in reference to the line. As pointed out by Malaysia, not only was this not the case, but the terms of the 1915 Agreement and the map annexed to it clearly show that the intention of the Parties was to determine the boundary up the east coast of Sebatik and no further.[66]

4.47. The Joint Report,[67] signed by Messrs. Schepers and Vreede for the Netherlands and Bunbury and Kendell for Britain, determined by mutual agreement the position of the boundary line. The Parties gave a free hand to the Commissioners. The Commissioners did not hesitate to depart from the strict text of the 1891 Boundary Convention if necessary and, for instance, changed the boundary line in the channel between the west coast of Sebatik and mainland Borneo, in order to reach the middle of the mouth of the river Troesan Tamboe.

4.48. The report determines the boundary as traversing the island of Sibetik, following the parallel of 4° 10' north latitude, as already fixed by Article 4 of the Boundary Convention and marked on the east and west coast by boundary pillars. There is no question of any extension of the boundary line east out to sea, nor a reference to a further delimitation as provided by the

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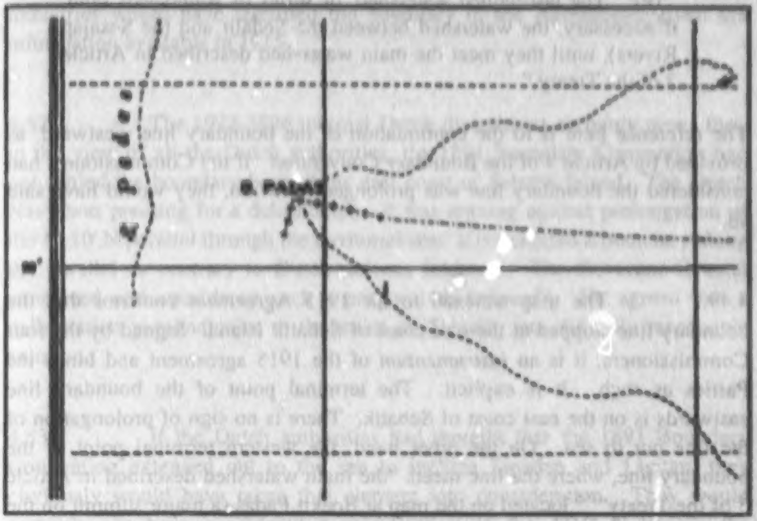
[65] IC-M, vol. 1, p. 99, para. 5.101.

[66] MC-M, vol. 1, pp. 42-48, paras. 2.67-2.78.

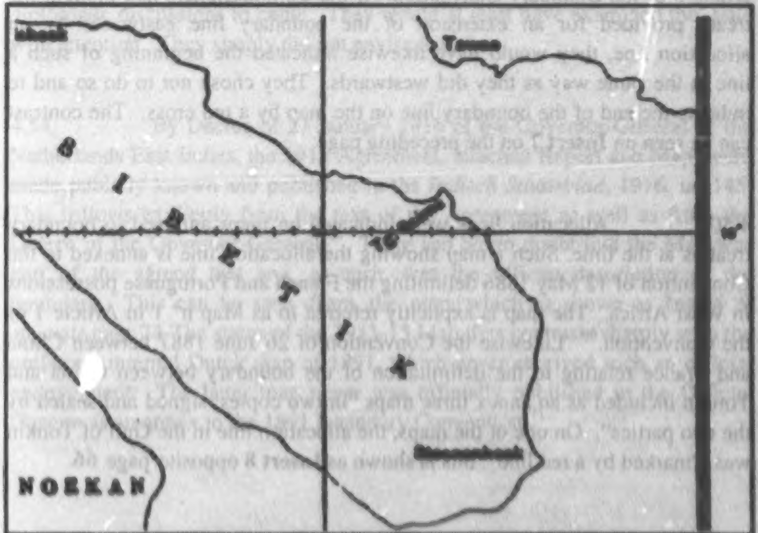
[67] IC-M, vol. 2, Annex 25.

## Insert 7

### Map attached to the 1915 Agreement (Extracts)



Western terminal point of the boundary-line as agreed



Eastern terminal point of the boundary-line as agreed

Boundary Convention. On the other hand, the western end of the delimitation by the Joint Commission is so described:

> "(g). The last-named watershed, or series of watersheds (and, if necessary, the watershed between the Sedalir and the Sesajap Rivers), until they meet the main watershed described in Article 3 of the Treaty."

The reference here is to the continuation of the boundary line westward, as provided by Article 3 of the Boundary Convention. If the Commissioners had considered the boundary line was prolonged eastward, they would have said so.

4.49. The map annexed to the 1915 Agreement confirms that the boundary line stopped at the east coast of Sebatik Island. Signed by the four Commissioners, it is an *instrumentum* of the 1915 agreement and binds the Parties as such. It is explicit. The terminal point of the boundary line eastwards is on the east coast of Sebatik. There is no sign of prolongation of the line out to sea. On the other hand, the western terminal point of the boundary line, where the line meets "the main watershed described in Article 3 of the Treaty",[68] located on the map at Boekit Padas (a major summit on the range of mountains), indicates a continuation due south, in accordance with article 3 of the Boundary Convention. If the Commissioners had thought the treaty provided for an extension of the boundary line eastwards by an allocation line, they would have likewise indicated the beginning of such a line in the same way as they did westwards. They chose not to do so and to indicate the end of the boundary line on the map by a red cross. The contrast can be seen on **Insert 7** on the preceding page.

4.50. Allocation lines were indicated on maps annexed to boundary treaties at the time. Such a map showing the allocation line is annexed to the Convention of 12 May 1886 delimiting the French and Portuguese possessions in West Africa. The map is explicitly referred to as Map n° 1 in Article 1 of the Convention.[69] Likewise the Convention of 26 June 1887 between China and France relating to the delimitation of the boundary between China and Tonkin included as an annex three maps "in two copies, signed and sealed by the two parties". On one of the maps, the allocation line in the Gulf of Tonkin was "marked by a red line": this is shown as **Insert 8** opposite page 66.

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[68] Tawao Report, sub. (8) (g.)

[69] Award of the Arbitral Tribunal, para. 45.

4.51. The lesson is clear. If the Commissioners had thought that such an allocation line existed to the east of Sebatik, they would have at least indicated it on the map. If they had omitted to do so, the concerned foreign ministries would have specified the boundary in the Agreement, given the information available in 1915.

4.52. The 1922-1926 internal Dutch discussions certainly prove that, in the view of all the Dutch authorities, the 1891 Boundary Convention had not settled the boundary beyond the east coast of Sebatik Island. The Dutch Navy was pressing for a delimitation. It was arguing against prolongation of the 4° 10' N parallel through the territorial sea. It considered a boundary along the parallel as contrary to Dutch defence interests. The Governor-General concurred and considered such a proposal as "absurd". He agreed that a delimitation perpendicular to the coast of Sebatik was the only reasonable solution.

4.53. If the Dutch authorities had thought that the 1891 Boundary Convention extended out to the sea to include Sipadan and Ligitan, they obviously would have taken that element into consideration. They would certainly not have considered a modification of the 4°10' N line in the territorial waters, thus risking jeopardy of the allocation of the islands in the diplomatic discussions to come. They would at least have examined the issue with attention. They simply did not envisage it.

4.54. By Decree of 27 January 1916 of the Governor-General of the Netherlands East Indies, the 1915 Agreement, attached Report and Map, were made publicly known and published in the *Indisch Staatsblad*, 1916, no 145. This follows explicitly from the text of the Agreement as well as from the Decree of the Governor-General.[70] There can be no doubt that the Map was part of the agreed text and, as such, was the official description of the boundary. This can be seen from the map, which is shown as Insert 9 opposite page 74. The status of the 1913-15 Map thus contrasts sharply with the unilateral internal Dutch map of 1891, which never received such an official endorsement. The latter map never was officially published in the Official Gazette as an annex to the 1891 Boundary Convention.[71]

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[70] MR, Annex 5.

[71] See the text of the 1891 Boundary Convention as published in the *Indisch Staatsblad*, 1892, no. 114.

4.55. To sum up the positions of Indonesia and Malaysia on the 28 September 1915 Agreement and official Map: (a) both Parties accept the existence, status and authority of the 1915 Agreement and Map, signed by the four Commissioners and embodied in the international agreement, as an international obligation; (b) both Parties agree that the boundary determined by the Agreement and Map stops (or starts) at the point where the 4° 10' N parallel intersects with the east coast of the island of Sebatik; and (c) both agree that the 1915 Agreement and Map do not determine any boundary line within territorial waters or allocation line beyond.

4.56. Where the Parties disagree is on the legal conclusions to be drawn from the agreed facts. Indonesia argues that:

> "Accordingly, the fact that the 1915 Agreement, and the 1913 Report incorporated into it, said nothing about the boundary eastwards from the island of Sebatik, i.e. out to sea in the direction of, and to the north of, Sipadan and Ligitan, carries with it no implication that the 1891 Agreement did not make provision for the eastward course of the boundary out to sea."[72]

4.57. Malaysia considers that the 1915 Agreement and Map constitute an authentic interpretation of the treaty. In fact, the Map is the only official map relating to the area and annexed to the treaty settlement. The Agreement and Map embody a "subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions" in the sense of article 31 (3) (a) of the Vienna Convention and, as such, "override general rules of interpretation"[73] if necessary. The 1915 Agreement and Map were implemented by the Parties with no difficulty for more than fifty years. Indonesia "has, for fifty years, enjoyed such benefits as the Treaty of [1915] conferred upon her, if only the benefit of a stable frontier... It is not now open to [Indonesia], while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it."[74]

4.58. The negotiations opened for the second Agreement pursuant to the 1891 Boundary Convention were concluded two years later, in 1928.[75] If the Government of the Netherlands had any doubts or second thoughts after the lengthy internal discussions about the issues of maritime delimitation and allocation of islands, the obvious opportunity was there. The Government decided not to raise the issue and to stay content with the Convention as it was in the vicinity of Sebatik, with no extension to territorial waters or, indeed, beyond.

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[72] IC-M, vol. 1, p. 103, para. 5.111.

[73] *Oppenheim's International Law*, 9th edition, vol. 1, p. 1268, para. 630.

[74] *Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Reports, 1962, p. 32.

[75] Indonesia rightly insists on the importance of the issue and states that Malaysia fails to mention the 1928 Agreement "in this context". IC-M, vol. 1, para. 5.98, p. 98. But see MC-M, vol. 1, p. 46, para. 2.77.

## F. Conclusion

4.59. In conclusion:

(a) The 1891 Boundary Convention addressed the issue of the land boundary in Borneo.

(b) No maritime delimitation was considered by the Parties during the conclusion of the 1891 Boundary Convention.

(c) Allocation lines were a current practice in 1891 and the years following. But there is no indication whatsoever that the Parties considered drawing an allocation line concerning distant islands off the coast of British North Borneo in 1891.

(d) The internal Dutch map was never "officially communicated" to the British Government or "promulgated" by the Netherlands. It never constituted an agreement or an instrument accepted by the other Party in relation to the treaty in the sense of the Vienna Convention.

(e) Subsequent conduct, practice and agreements confirm that the 1891 Boundary Convention did not address the issue of maritime delimitation beyond the coast of Sebatik, much less the issue of allocation of distant islands.

# Chapter 5

# Possession and Administration of the Islands post-1891

## A. The Two Strands of Malaysia's Case

5.1. Chapter 6 of the Malaysian Memorial demonstrated in detail the continuous peaceful possession and administration of the islands by Malaysia and its predecessors in title. This was expressed to be "a second and parallel basis for upholding Malaysia's title".[1] The first basis was that "title to the islands was acquired by grant of the previous sovereign, a situation which was recognised by and was opposable to all relevant states in the region as a result of published treaties". Malaysia emphasised that "each of these strands is by itself sufficient to uphold Malaysia's position against Indonesia".[2] Malaysia's sovereignty over the offshore islands of North Borneo (now Sabah) is thus based on transactions with Sulu, Spain and the United States *and* on the continuous administration and exercise of authority over the islands in question, an administration going back to the late nineteenth century.

5.2. As to the first strand, the title to the islands based on the United States grants of 1907 and 1930, the position has already been thoroughly canvassed in earlier Malaysian pleadings.[3] It is summarised with references to the evidence in Chapter 2 above.[4] On these issues, Indonesia has relatively little to say in its Counter-Memorial,[5] and what it does say is of little value. It is accordingly not necessary to deal with these issues yet again *in extenso*. Before turning to the second strand of Malaysia's case, only a few remarks are called for.

5.3. Indonesia seeks to argue that the 1885 Protocol did not extend to the islands, relying on later, purely geographical definitions of the Sulu Archipaelago and without paying any regard to the diplomatic history, in particular Article III of the very same Protocol.[6] It also seeks to rely on the United States uncertainty about the position following the voyage of the *Quiros*, and its non-distribution of the 1903 Hydrographic Office map.[7] But it is clear both from the context and from the correspondence that the uncertainty about which islands were affected (an uncertainty which Britain and the United States shared) had nothing to do with putative Dutch territory or putative Dutch claims. The *difficulty* related to the problem of drawing a 9 nautical mile line along a complex coastline with many inshore islands. The *issue* was perfectly clear: whatever islands did not belong to the North Borneo belonged to the United States.[8] In this discussion the Netherlands, although aware of the question of the outlying islands,[9] neither was nor sought to be an interlocutor.

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[1] MM, vol.1, p.60, para. 6.1.

[2] MM, vol.1, p.29, para. 5.1.

[3] See MM, vol.1, ch. 5; MC-M, ch. 3.

[4] See above, paragraphs 2.4, 2.24-2.29.

[5] See IC-M, vol.1, ch. 6.

5.4. More generally, Indonesia still fails to grapple with an essential difficulty in its case. It denies that the Sultan of Sulu could have retained authority over the islands in dispute.[10] But it ignores the point that the Dutch authorities in 1891 *recognised* the effect of the Sultan's grant so far as concerned mainland and islands (including Sebatik itself) 40 miles further east. How could the Sultan of Sulu have granted title to Darvel Bay and its islands, to Batu Tinagat and to the territory of Borneo as far west as the mainland opposite Sebatik, and not have retained title over islands more than 9 miles from Semporna? In 1878, no-one had the slightest idea about a 4° 10' line. No doubt Britain, if it had by 1890 acquired title to the islands beyond 9 nautical miles (either by occupation of *terra nullius* or adverse possession) could have ceded them to the Netherlands in 1891. But this is not Indonesia's case, and understandably so, since — quite apart from other considerations — there was no question in the negotiations in 1889-1891 that Britain was ceding any of its eastern islands to the Dutch. No more was it suggested that the Dutch were ceding Omadal or Mabul to the British!

5.5. Faced with this fundamental lacuna in Indonesia's case (a case based upon a title the origins of which are now entirely mysterious[11]), there is nothing more to be said on the first strand of Malaysia's case at this stage. It is however necessary to say something more about the second strand of Malaysia's case, based on its long-standing administration of the islands in question. To this issue Indonesia devotes Chapter VII of its Counter-Memorial.

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[6] IC-M, vol.1, pp.109-110, paras. 6.7-6.11. In the circumstances the conclusion at para. 6.11 is the merest assertion.

[7] IC-M, vol.1, pp.113-115, paras. 6.23-6.28.

[8] See MC-M, vol.1, p.67, para. 3.26.

[9] As shown in correspondence helpfully annexed by Indonesia: IC-M, vol. 2, Annexes 28-29.

[10] IC-M, vol.1, p.52, para. 4.26.

[11] Indonesia now accepts that it is doubtful whether Bulungan had any title to the area in dispute: see above, paragraph 3.1 and references.

5.6. The evidence of the continuous possession and administration of the islands by Malaysia and its predecessors was set out in Chapter 6 of the Malaysian Memorial and summarised in Chapter 2 of this Reply.[12] That evidence is compelling. Neither Indonesia's comments thereon, nor its assertion of alleged countervailing manifestations of title by the Netherlands, in any way succeed in diminishing the legal force of the conduct of Malaysia and its predecessors.

## B. The Facts relating to Administration of the Islands

5.7. In section 2 of Chapter VII of its Counter-Memorial, Indonesia purports to examine the acts identified by Malaysia as evidence of the administration of the islands by the BNBC, the British colonial authorities or itself. It begins[13] by referring to the opening paragraphs of the relevant section of the Malaysian Memorial, in which Malaysia describes the administrative structure of the region of which the islands are evidently a part. The principal points in this introductory description, namely, the demonstration of the authority of North Borneo over the Bajau communities on the various islands lying off-shore the Semporna peninsula[14] and the co-option of the local leaders, appear not to have been understood by Indonesia. For the principal response made by Indonesia is that none of the acts concerned either Ligitan or Sipadan because they all related to towns or islands located north of the 4°10' line.[15]

5.8. Once again, this approach demonstrates Indonesia's inability to adopt as a starting point of its argument anything other than the conclusion that it must prove. Indonesia starts from the proposition that the line of 4° 10' is an "allocation" line by which the 1891 Convention allocated to Britain the places north of the line. This "allocation" argument has been disposed of in Chapter 4.[16] The 1891 Convention line was not an allocation line and nothing in it attributed to the Netherlands those islands clearly associated with the Semporna peninsula that happened to lie south of that line.

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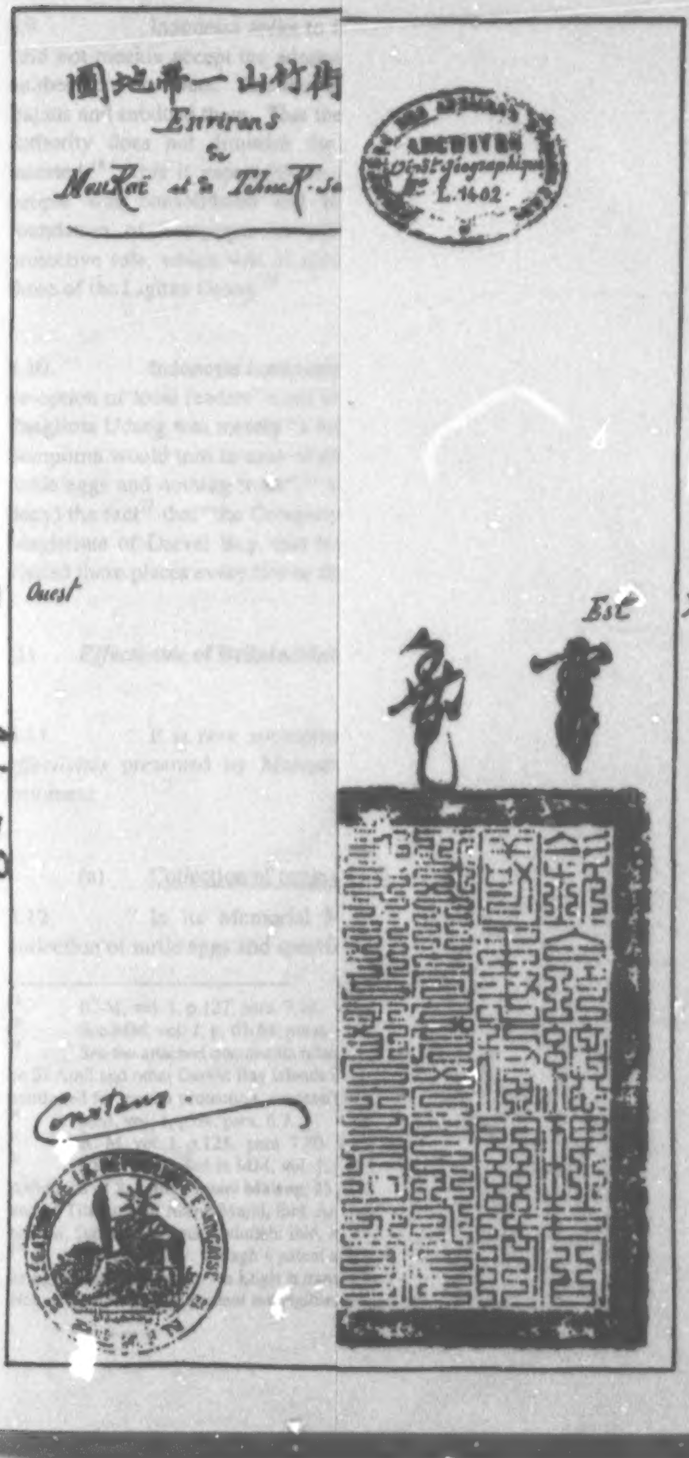
[12] See above, paragraphs 2.13-2.31.

[13] IC-M, vol. 1, p.126, para. 7.16.

[14] MM, vol. 1, pp.63-64, para. 6.6.

[15] IC-M, vol. 1, pp.126-127, para. 7.17.

[16] See above, paragraphs 4.22-4.33.



街竹山一帶地圖

Environs de NeuKoï et de TchouK-Sa

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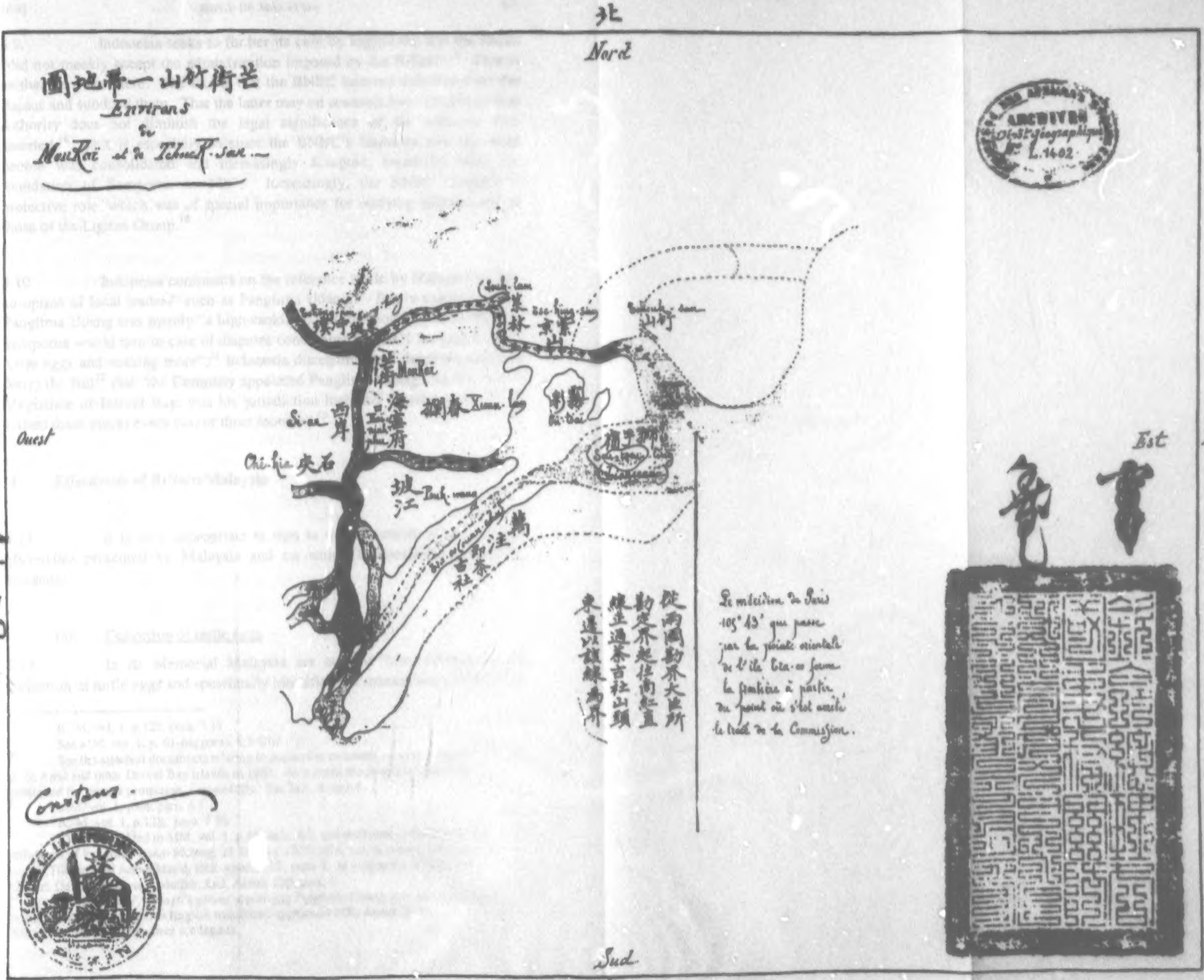
## Insert 8

### One of the Maps annexed to the Convention of 26 June 1887 between China and France



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5.9. Indonesia seeks to further its case by suggesting that the Bajau "did not meekly accept the administration imposed by the BNBC".[17] That is neither here nor there. The fact is that the BNBC asserted authority over the Bajaus and subdued them. That the latter may on occasion have disobeyed that authority does not diminish the legal significance of the authority thus asserted.[18] This is especially so since the BNBC's authority over the local people was consolidated and increasingly accepted, especially after the foundation of Semporna in 1887. Increasingly, the BNBC assumed a protective role, which was of special importance for outlying islands such as those of the Ligitan Group.[19]

5.10. Indonesia comments on the reference made by Malaysia to "the co-option of local leaders" such as Panglima Udang.[20] But in suggesting that Panglima Udang was merely "a high-ranking local to whom the inhabitants of Semporna would turn in case of disputes concerning precisely the gathering of turtle eggs and nothing more",[21] Indonesia disregards (and therefore does not deny) the fact[22] that "the Company appointed Panglima Udang... as the Native Magistrate of Darvel Bay, that his jurisdiction included Sipadan and that he visited these places every two or three months".[23]

### (1) *Effectivités* of Britain/Malaysia

5.11. It is now appropriate to turn to the discussion of the specific *effectivités* presented by Malaysia and on which Indonesia has sought to comment.

### (a) Collection of turtle eggs

5.12. In its Memorial Malaysia set out the facts relating to the collection of turtle eggs and specifically identified the manner and extent of the involvement of the British authorities in the East Coast Residency at Tawao and Semporna.[24] It was noted, moreover, that there was never any Dutch or Indonesian involvement in the matter.[25]

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[17] IC-M, vol. 1, p.127, para. 7.19.

[18] See MM, vol. 1, p. 61-64, paras. 6.5-6.6.

[19] See the attached documents relating to protective measures necessary because of raids on Si Amil and other Darvel Bay islands in 1962. As a result the people of Danawan petitioned for greater protection, successfully. See MR, Annex 6.

[20] MM, vol. 1, p.64, para. 6.7.

[21] IC-M, vol. 1, p.128, para. 7.20.

[22] Clearly recorded in MM, vol. 1, p.64, para. 6.7, and evidenced *inter alia* by the Affidavits of Panglima Imam Malang, 23 January 1975, MM, vol. 4, Annex 116, para. 14 and of Tilaran Haji Adbul Majid, ibid. Annex 117, para. 8, as well as the Affidavit of his son, Datuk Panglima Abdullah: ibid, Annex 120, para. 2.

[23] Governor C.V. Creagh's patent appointing Panglima Udang was written in Malay using Arabic characters. An English translation appears as MR, Annex 7. Not all the words in the patent are legible.

5.13. Indonesia expressly states that it "does not contest these facts", though it goes on to say that "Malaysia exaggerates these acts and gives them a legal significance they do not deserve".[26] Neither of these criticisms can be sustained.

5.14. There is no exaggeration in the statement of the facts. Indonesia's assertion that "Malaysia ignores the fact that Indonesians too used to collect turtle eggs on Sipadan before the occupation of the island by Malaysia"[27] is not supported by any evidence. Indonesia pretends to find some support in the affidavits attached to its Memorial which establish that Indonesian fishermen also used to fish in the waters around Sipadan.[28] But that is certainly not evidence that Indonesia ever collected turtle eggs there. Nor does the affidavit of Mr Paraggam[29] help Indonesia. It says only that "Circa 1960s I was asked by my relative, Haji Abdul Hamid, a Bajau Tribe from Sampurna, Malaysia, to look after turtle eggs at Sipadan Island, where I stayed for two months". On the basis of this affidavit, clearly dredged up by Indonesia at the last moment (as it is dated 6 February 2000), Indonesia now suggests that the collection of turtle eggs was a "Bajau matter which had nothing to do with sovereignty over the island"[30]. If it was a Bajau matter, surely that is indicative of the absence of any Dutch or Indonesian authority in that region. In fact, however, the affidavit, for all its vagueness about dates and details, again shows that the title to collect turtle eggs on Sipadan came from the Darvel Bay Badjau community, and not from Bulungan or the Netherlands or Indonesia.

5.15. More significantly, the Indonesian suggestion passes over in total silence the fact, set out in detail by Malaysia, that as early as 1914 Britain took steps to regulate and control the collection of turtle eggs on Ligitan and Sipadan and continued to deal officially with matters related thereto.[31] And then, as if to denigrate the significance of the evidence of British official conduct, Indonesia pretends that the regulations issued [illegible] were merely an extension of personal not territorial jurisdiction — a contention that is manifestly not in accordance with the facts.

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[24] MM, vol. 1, pp. 65-69, para. 6.9-6.23.

[25] MM, vol. 1, p. 65, para. 6.10.

[26] IC-M, vol. 1, p.129, para. 7.24.

[27] IC-M, vol. 1, p.129, para. 7.24.

[28] IC-M, vol. 1, p.130, para. 7.28.

[29] Ibid.

[30] IC-M, vol. 1, p.131, para. 7.28.

[31] See MM. vol. 1, pp. 65-68, para. 6.10-6.20, and see the summary, above, paragraph 2.15 with reference to the documents.

5.16. Equally to be rejected is the following unparticularised allegation by Indonesia: "It is true that Malaysia refers to various documents that it misleadingly tries to use as proof that the British authorities acted as though they considered that the island of Sipadan belonged to them. However, this is not the case."[32] It is clear on the face of the documents in question[33] that, contrary to the Indonesian contention, they demonstrate the British view that Sipadan was within British territorial jurisdiction. Why else would the British Assistant District Officer of Semporna have concerned himself for many years with the regulation of turtle egg collection on Sipadan?[34] Why would Panglima Abu Sari, as reported in the same letter, have said he thought that "it was a Government Order" that Panglima Udang should have a share in the eggs? And on what basis would the British Assistant District Officer have had authority tell Panglima Udang to stop collecting eggs on Sipadan in the absence of a licence? It is to be noted that in identifying the so-called "misleading" documents, Indonesia mentions only two[35] and omits to mention those documents cited in other paragraphs of the same part of Malaysia's Memorial.[36]

5.17. Indonesia seeks to place an wholly unsupportable construction on the terms of the British Turtle Preservation Ordinance 1917,[37] pretending that the mention of Ligitan and Sipadan as "native reserves" meant that they were not subject to British sovereignty. The words of the Ordinance do not support such a construction. Section 2 of the Ordinance makes it clear that it applies to the collection of turtle eggs "within the State or the territorial waters thereof". Section 3 is an exception clause relating to native reserves within the State. Such a clause would have been entirely unnecessary if such reserves had not been subject to British jurisdiction as part of the State. This is clearly confirmed by the fact that the other native reserves listed in Schedule C of the Ordinance, namely, the area from Nosong Point in Kimanis Bay to Jesselton, including Pulau Tiya and Gaya Island and Kudat District, including the islands therein, were and are incontrovertibly parts of the State far removed from any area that could be the subject of territorial dispute. What matters about the

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[32] IC-M, vol. 1, p.131, para. 7.31.
[33] MM, Annexes, vol. 4 Annexes 91-99.
[34] MM, Annexes, vol. 4 Annex 91.
[35] Those mentioned in MM, vol. 1, pp. 65,67 paras. 6.11, 6.16.
[36] See MM, vol.1, pp. 66-68, paras. 6.13, 6.14, 6.15, 6.18, 6.19, 6.20.
[37] MM, vol. 4, Annex 97.

1917 Ordinance is that in identifying Sipadan Island as a native reserve, it is treating it as part of British territory.

5.18. If any additional evidence is required of the fact that Britain regarded the native reserves as subject to its sovereignty and jurisdiction, it is to be found in the proviso that appears in the last two lines of Section 3 of the Ordinance:

> "... provided that natives collecting turtle eggs in such areas shall be subject to any rules declared hereunder for the protection of the industry."

5.19. Indonesia attempts to denigrate the significance of the mention of Sipadan as one of "our islands" in the official 1922 report on "Commercial Sea Products from the Coast of British Borneo", complaining that "no details of the author... are given nor are any details provided about who was involved in the study".[38] But the document on its face has an official provenance and has obviously been carefully prepared on the basis of governmental records. And the complaint that the report is "a one-off document"[39] really scrapes the bottom of the barrel. What is wrong with a "one-off" document if its official character is manifest, it evidences the understanding of the British authorities regarding the extent of their territory in that year and was obviously not prepared for the purposes of the present litigation?

5.20. Finally, Malaysia is bound to draw attention to Indonesia's suggestion that the British authorities "lacked a clear idea as to who was the owner of Sipadan".[40] This suggestion is totally contradicted by the hard evidence of Britain's activities in relation to Sipadan in respect of the principal economic activity relevant to that island at that time, namely, the collection of turtle eggs. And the insufficiency of the Indonesian argument becomes the plainer when one recalls that at no time and in no respect whatsoever did the Netherlands give any indication of its claim to title over Sipadan. The use of the words "in fact" to introduce the Indonesian assertion that the local inhabitants "were used to gathering turtle eggs in full co-operation with local Bajau inhabitants who were governed by the Dutch administration" is a totally unfounded and unsupported invention. The local inhabitants who gathered turtle eggs were from Danawan, one of the Ligitan Group. They looked to Lahad Datu and Semporna for assistance in the resolution of disputes and confirmation of their rights.[41] Indonesia produces no evidence at all to support its suggestion that any of the inhabitants in that locality "were governed by the Dutch administration".

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[38] IC-M, vol.1, p.132, para. 7.34.

[39] Ibid.

[40] IC-M, vol.1, p.133, para. 7.35.

### (b) Bird Sanctuary

5.21. The next example given by Malaysia of British official activity in relation to Sipadan was the action of the Conservator of the Forests at Sandakan in proposing in 1932 the establishment of a megapode preserve on Sipadan, and the subsequent implementation of the proposal in a notification in the Official Gazette in 1933.[42] Indonesia centres its comment on the 1935 map of the District of Lahad Datu which shows Sipadan as a "bird sanctuary". Indonesia's comment on the map (which, of course, has nothing to do with the legal significance of the actions taken by Britain in 1933) is that it does not include Sipadan within the lines "which seem to demonstrate the extent of the administrative boundaries".[43] Irrelevant as this comment is to the significance of the British actions of 1933, it provides yet another example of Indonesia's inclination to rest its contentions on a misdescription of the facts. The same sentence in which Indonesia mentions the fact that Sipadan is not surrounded by the lines which demarcate the extent of the administrative boundaries also includes the statement that in this respect Sipadan is "unlike all the other islands situated north of latitude 4°10' N". This statement, with its implication that because Sipadan did not fall within administrative boundary lines drawn on the map, therefore it was not regarded as part of British North Borneo, is simply wrong. Sipadan is not "unlike all the other islands situated north of latitude 4° 10' N". Moving from west to east across the waters south of the Semporna Peninsula, the map shows that the following islands, all lying north of the 4° 10' N line, are not included in the limits depicting Semporna: Gusungan, Mabul, Kapalai, Danawan and Si Amil. There has been no challenge to Malaysian title over these islands on the ground that they were outside the limits of Semporna. There is no reason why Sipadan and Ligitan should be regarded differently.

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[41] It may be noted that Malaysian concern for conservation of turtles nesting on Sipadan continues to the present day. In 1993, on instruction of the Malaysian Government, the companies which conduct tourist operations on Sipadan entered into an agreement with the two Semporna residents who continue to have the right to collect turtle eggs on Sipadan. Under the Agreement, an annual payment is made to these two persons, Alukan bin Kaseh and Munting bin Pg. Abu Sari, and they agree not to exercise their right to collect eggs on Sipadan. Both parties to the Agreement "covenant that they shall endeavour to ensure that all turtle eggs laid shall remain in situ for the natural hatching and there shall be no removal of the same save in accordance with the instructions from the Department of Wildlife" (Clause 7) For the Agreement see MR, Annex 8.

[42] MM, vol. 1, p. 69, para. 6.24, supported by MM, vol. 4, Annexes 100, 101.

[43] IC-M, vol.1, p.133, para.7.37.

5.22. Finally, in this connection, Indonesia contends that the actions of the British authorities in relation to megapodes do "not amount to proof of the colonial authorities' wish to behave *à titre de souverain* over Sipadan".[44] It is difficult to know what content Indonesia would give to the concept of "*à titre de souverain*" if it does not include governmental legislation and other official actions implementing such legislation adopted as a matter of public interest, namely the protection of the environment.[45] As was said in the *Eritrea/Yemen* case:

> "Evidence of intention to claim the Islands *à titre de souverain* is an essential element in the consolidation of title. The intention can be evidenced by showing a public claim of right or assertion of sovereignty over the Islands as well as legislative acts openly seeking to regulate activity on the Islands."[46]

### (c) Construction and maintenance of lighthouses

5.23. As further evidence of British/Malaysian governmental activity in relation to Sipadan and Ligitan, Malaysia refers to the construction, notification and maintenance by the North Borneo Government of navigational aids and lights on the islands from 1962 onwards.[47]

5.24. Indonesia's response falls into two parts. The first purports to be an explanation of why Indonesia did not object to the construction of the lights in 1962 and 1963.[48] But even if the excuses produced by Indonesia for its silence in 1962 and 1963 were valid (and Malaysia sees no point in debating the political conditions of that time or the then policy of Confrontation which was the source of so many difficulties), Indonesia does not assert that they extended beyond the first half of the 1960s. No explanation is offered by Indonesia as to why it did not raise any objection to the lights after that time.

5.25. The second part of the Indonesian response draws upon two cases — the *Eritrea/Yemen* case and the *Minquiers and Ecrehos* case — to support the contention that the establishment of lights and buoys is not normally taken as a test of sovereignty and does not constitute proof of occupation *à titre de souverain*.[49] It is true that in those two cases the Arbitral Tribunal and this Court respectively did not find that the construction of the lights was sufficient evidence of the intention of the Government concerned to act as sovereign over the territorial location of the lights. But that conclusion was reached on the basis of the facts particular to each of the two cases, and cannot be applied to the two islands here.

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[44] IC-M, vol.1, p.133, para.7.38.

[45] See MM, vol. 4, Annex 101.

[46] 114 International Law Reports, p. 69, para. 241.

[47] See MM, vol. 1, pp.69-70, paras. 6.25-6.29. The supporting evidence is in MM, vol. 4, Annexes 108-111, 113.

[48] IC-M, vol. 1, p.134, para. 7.39.

[49] IC-M, vol. 1, pp.134-135, paras. 7.40-7.43.

5.26. The circumstances in which the Tribunal in the *Eritrea/Yemen* case made its remarks about the effect of the establishment of lighthouses are peculiar to that case, whereas a reading of the whole of the relevant part of the Award, and not merely the lifting of a line out of context, shows that the States concerned did not, in their special situation, regard the construction of a lighthouse with the knowledge and consent of the other interested States as leading to the conclusion that the State constructing the light thereby intended to act *à titre de souverain* in respect of the location of the light.[50] In the present case there was no such situation. There was no discussion between Britain/Malaysia and Indonesia regarding the construction of the lights. There was no question of whether Indonesia might construct the lights instead of Malaysia. The construction of the lights was a straightforward reflection of the sovereign authority of Britain/Malaysia. That authority was duly publicised and was never challenged by Indonesia.

### (d) Control of tourism

5.27. By way of indication of the continuity of the exercise of its authority over Sipadan, Malaysia has described the development of Sipadan as an attraction to tourists, especially scuba divers.[51] Indonesia admits these facts, but claims that it "has protested on many occasions about these developments".[52] Examination of the passages to which the Indonesia refers shows that Indonesia made no protest on this subject before May 1988;[53] and that the only subsequent Indonesian protests were made in 1992, 1993 and 1994. There is also an element of exaggeration in Indonesia's description of its protests. For example, it lists under what it calls its numerous "notes verbales" a report of 1999 which was purely an internal report of the Indonesian Navy.[54]

5.28. But the important point to be made about these protests is that they did not begin until 1988, apart from the discussion between the two sides in 1969. No protest of any kind was made by Indonesia until 1980[55] and this related not to tourism but to Malaysia's map of 1979 showing the limit of

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[50] See e.g. 114 International Law Reports, at p. 66, para. 232.
[51] MM, vol. 1, pp.18, 71, paras. 3.19, 6.30-6.31.
[52] IC-M, vol. 1, p.135, para. 7.45.
[53] IM, vol. 1, p.171, para. 8.71.
[54] IM, vol. 4, Annex 182.
[55] IM, vol. 4, Annex 140.

Malaysia's territorial waters and continental shelf. As can be seen from the annexes to Indonesia's own Memorial, each of these protests was rejected by Malaysia.[56]

## (2) Absence of Dutch and Indonesian *effectivités*

5.29. It is now necessary to turn to what the ICM calls "Dutch and Indonesian activities relating to the Islands" — a description which is remarkable having regard to the paucity of positive evidence that the section contains. Once again the Court is treated to the spectacle of Indonesia attempting to make a soufflé without eggs.

5.30. The opening substantive paragraph begins with the statement: "After the entry into force of the 1891 Convention the Dutch activities continued..."[57] A footnote refers to the so-called pre-1891 activities. Examination of this reference shows that only one of the items in question even alludes to Sipadan. "During the period from 1875 to 1877 the Dutch vessel HNLMS *Admiral van Kinsbergen* conducted patrolling activities both around the island of Sipadan and even around islands lying further to the north". The only item of evidence adduced in support of this assertion is an extract from the ship's log book, misleadingly described as "Extract from the log-book of HNLMS *Admiral van Kinsbergen* for 10 and 11 June 1876 *on patrol off the coast of Boeloengan*" (emphasis supplied).[58] As has been shown, the original manuscript text of the logbook in the Dutch language contains no mention of the italicised words. Indeed, the general location is described as "Solozee".[59]

5.31. So much (or so little) then for "activity before 1891". What about activity after 1891?

5.32. Taken in chronological order, Indonesia refers first to the surveying activities of HNLMS *Macasser* in 1903. The "real significance" attached by Indonesia to this survey "is that it shows Dutch activities in the area, demonstrating that the Dutch had interests there".[60] If isolated naval surveying and cartographic activity is sufficient to establish an "interest" in an area, and such display of interest is in its turn sufficient to evidence title to the

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[56] See IM, vol. 4, Annexes 141, 146, 148, 149, 150, 151, 153, 154, 156, 157, 159, 165, 166, 167, 168, 171, 172, 174.

[57] IC-M, vol. 1, p.136, para. 7.47, referring back to IC-M, para. 4.16.

[58] IC-M, vol. 2, Annex 12.

[59] See above, paragraph 3.23.

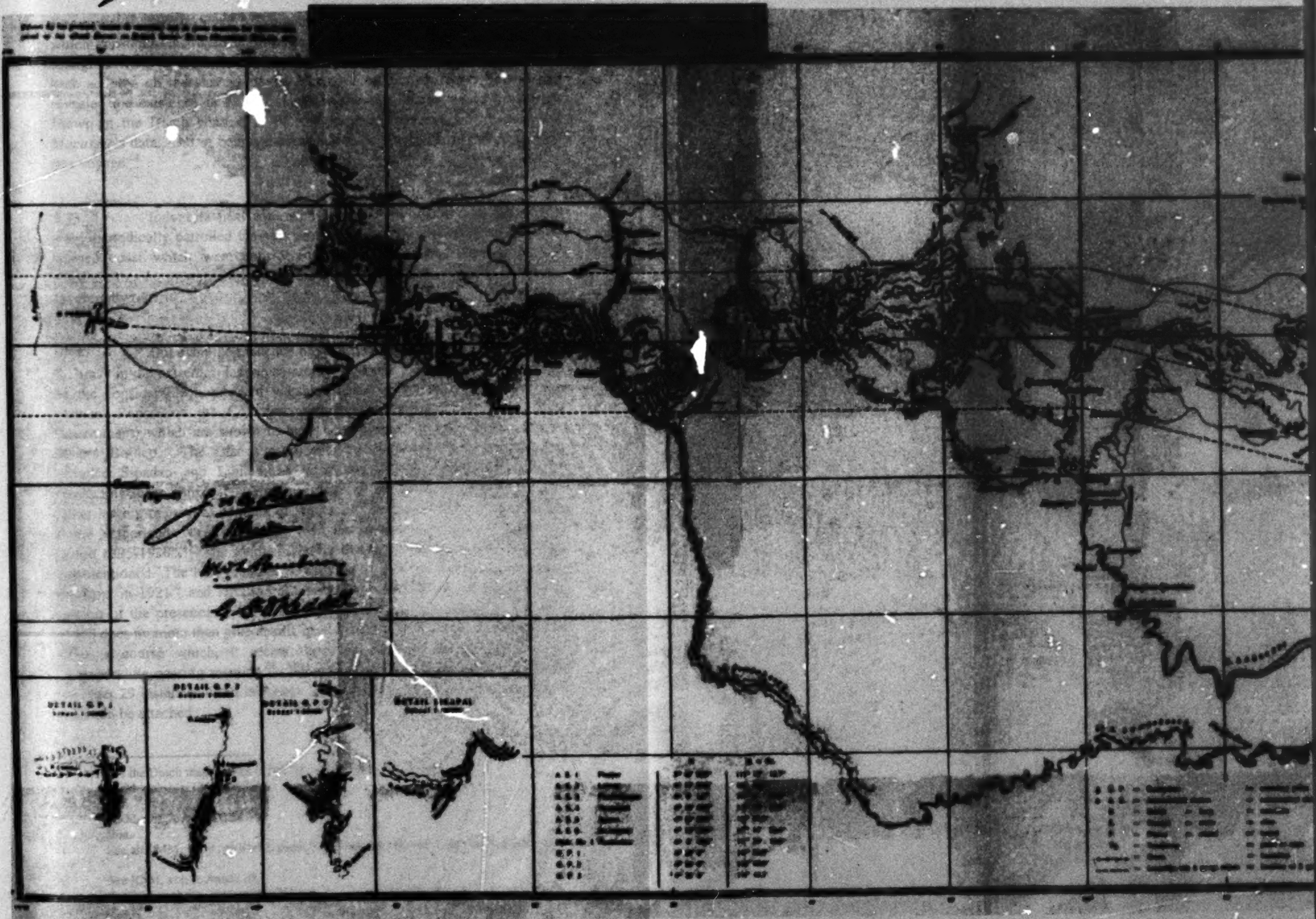
[60] IC-M, vol. 1, p.137, para. 7.50.

GRENSUITZETTING N.O. BORNEO
KAART VAN HET GRENSGEBIED

## Insert 9

## 1916 Gazette Map belonging to the 1915 Agreement

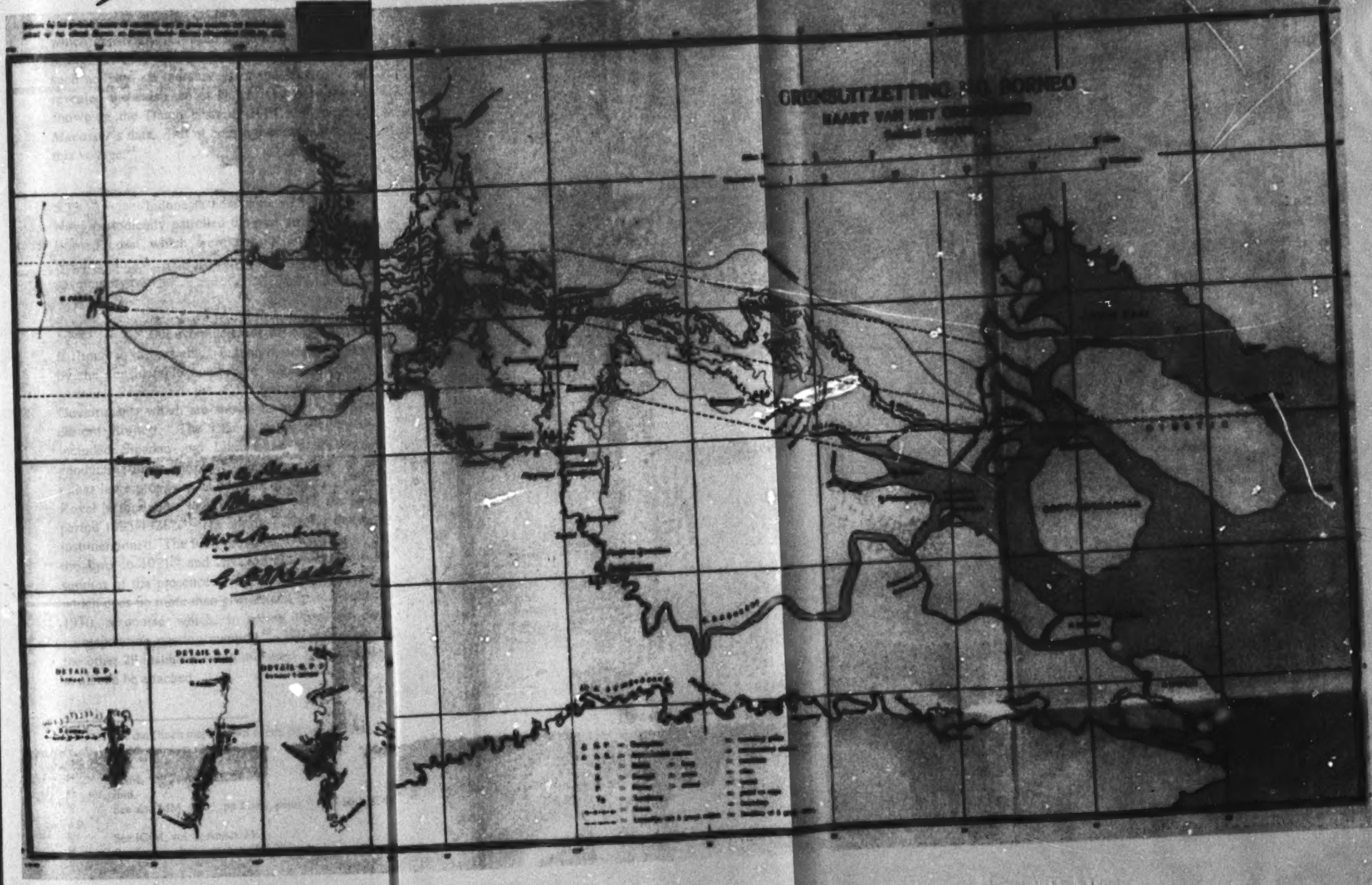
[illegible]



[redacted]

Insert 9

p belonging to the 1915 Agreement



area surveyed, then it should be compared with the activity of the British Navy which constantly surveyed and mapped the coasts of thousands of miles of foreign territory without Britain seeking to assert title thereto on the basis of such activity. If the surveys of the *Macasser* off British North Borneo had revealed the existence of Dutch islands in the area, these would have been shown in the Dutch chart of 1905 and its 1915 revision, which used the *Macasser*'s data. But of course they were not: no Dutch claim emerged from this voyage.[61]

5.33. Indonesia next asserts in very general terms that "the Dutch Navy periodically patrolled the seas around islands located off the north-east Borneo coast which were considered to be under Dutch sovereignty".[62] Needless to say, mere patrolling off the coast of an island does not evidence sovereignty over it.

5.34. But even the evidence of such patrolling provided by Indonesia is flimsy in the extreme. Indonesia merely says that this patrolling "is shown by the considerable number of warships listed in the *Koloniale Verslagen* (Annual Report on the Colonies presented to Parliament by the Dutch Government) which are shown to have been present off the coast of north-eastern Borneo. The islands considered to be under Dutch sovereignty included Sipadan and Ligitan, as is shown by the log-books of ships conducting these patrols."[63] The only material produced in support of these rather large propositions consists of Annex 32,[64] entitled "List of ships of the Royal Netherlands Navy present off the coast of Northeast Borneo during the period 1895-1928".[65] The source given for this list is the *Koloniale Verslagen* just mentioned. The ICM provides no backing for this list, except in two cases, the *Lynx* in 1921[66] and HNLMS *Koetei* in 1910.[67] The Annex produced in support of the presence of the *Koetei* is merely an extract from its log-book which does no more than give details of the course it pursued on 30 September 1910, a course which, it seems, involved passing by Sipadan with a corresponding passing mention.[68] No supporting details are given regarding the other 29 instances listed in Annex 32. To these, therefore, no significance at all can be attached.

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[61] See the Dutch maps shown in MC-M, vol. 2, Maps 2 & 3.

[62] IC-M, vol. 1, p.136, para.7.47.

[63] Ibid.

[64] IC-M, vol. 2, Annex 32.

[65] Ibid.

[66] See also MM, vol. 1, pp.81-82, paras.7.15-7.16; MC-M, vol. 1, pp.73-74, paras. 4.8-4.9.

[67] See IC-M, vol. 2, Annex 33.

[68] See further above, paragraph 3.25.

5.35. Even so, it may be noted that the "presence" said to have been manifested by these ships was not a regular presence but appears to have rather occasional and intermittent. This kind of intermittent "presence" proves nothing except that the area was evidently of only limited and occasional concern to the Netherlands Navy. Moreover, Indonesia provides no information at all on Dutch naval practice (if any) after 1928.

5.36. Indonesia then passes once more to what it describes as the "highly significant *Lynx* expedition" of November 1921. There is no need for Malaysia to repeat the comments that it has already made on this episode.[69] The crucial question, as with the *Makasser*, is: what happened next? In the case of the *Makasser*, the answer is: nothing. No claim was made on the ensuing maps.[70] The *Lynx* episode led to internal Dutch deliberations of 1922-1926, described already.[71] These indicate clearly that it did not occur to the Dutch naval authorities at that time that the boundary extended seaward of the territorial sea of Sebatik or that Sipadan fell within any area over which the Netherlands possessed title. As the Vice-Admiral of the Netherlands Indies and the Governor-General of the Netherlands Indies both said: "... it would hence be absurd to take the - merely accidental - last course of the land boundary as the determining factor for the maritime boundary".[72]

5.37. As regards the significance of the Indonesian Act of 16 February 1960, Malaysia has little to add to its earlier account.[73] Indonesia seeks in two ways to escape from the implications of its non-use in 1960 of Sipadan and Ligitan in the process of drawing its archipelagic baselines.[74]

5.38. The first is by stressing that international law does not require States when establishing archipelagic waters to use all permitted base points permitted under international law. This is a highly questionable proposition. The 1982 Convention on the Law of the Sea provides in article 47(1) that "an archipelagic State may draw straight baselines joining the outermost points of the *outermost* islands and drying reefs of the archipelago" (emphasis supplied).

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[69] See MM, vol. 1, pp.81-82, paras.7.15-7.16; MC-M, vol.1, pp.73-74, paras.4.8-4.9, and see above, paragraphs 3.26-3.29.

[70] See above, paragraph 5.31.

[71] See MC-M, vol. 1, pp.74-80, paras. 4.10-4.18, and see also above, paragraphs 3.26-3.29.

[72] See MC-M, vol. 1, pp. 74-75, paras. 4.11-4.12.

[73] MC-M, vol. 1, pp.83-86, paras. 4.25-4.31.

[74] See IC-M, vol. 1, pp.138.139, para.7.54-7.55.

"Outermost" means just what it says – outermost.[75] The assumption must be that in the absence of an express reservation, the islands selected as base points are in fact the outermost islands and that there are no more islands lying beyond them that are claimed as part of the archipelago or as being subject to sovereignty of the archipelagic State. Indonesia made no such reservation in 1960 and Malaysia was fully entitled, therefore, to believe that Sipadan and Ligitan were not claimed as part of the Indonesia archipelago.

5.39. The second device Indonesia uses to avoid the implications of its non-use of Sipadan and Ligitan is to compare Indonesia's failure to use Sipadan and Ligitan as base points to Malaysia's alleged non-use of the same islands in determining the extent of its territorial sea before 1969. But the two situations were not the same. Malaysia had not — and still has not — published a detailed map of its baselines. It has of course published its continental shelf boundaries, in 1979, in a way which takes full account of the two islands in question.[76] In the meantime it relies on the rules of the law of the sea relating to its land and island territories.

5.40. For Indonesia, by contrast, the task was one of implementing new legislation that sought to represent all the islands and the waters lying between them as a single unit, to be treated as Indonesian national waters subject to its sovereignty. The coverage of the legislation was intended to be thorough.[77]

5.41. In stating that it could also have claimed Sipadan and Litigan as base points, but did not do so, the only explanation Indonesia offers is that the 1960 Act "was the result of injudicious haste in the legislative process" and that the use of small-scale maps which were not able to depict certain Indonesian islands.[78] This is hardly plausible, especially having regard to the fact, of which Indonesia makes no mention, that the 1960 Act was foreshadowed on 14 December 1957 by a major announcement on the part of

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[75] There is no suggestion in the preparatory work of UNCLOS that "outermost" is used other than in its ordinary meaning. See the *Virginia Commentary* on UNCLOS, 1982, vol. 2, pp. 399-432.

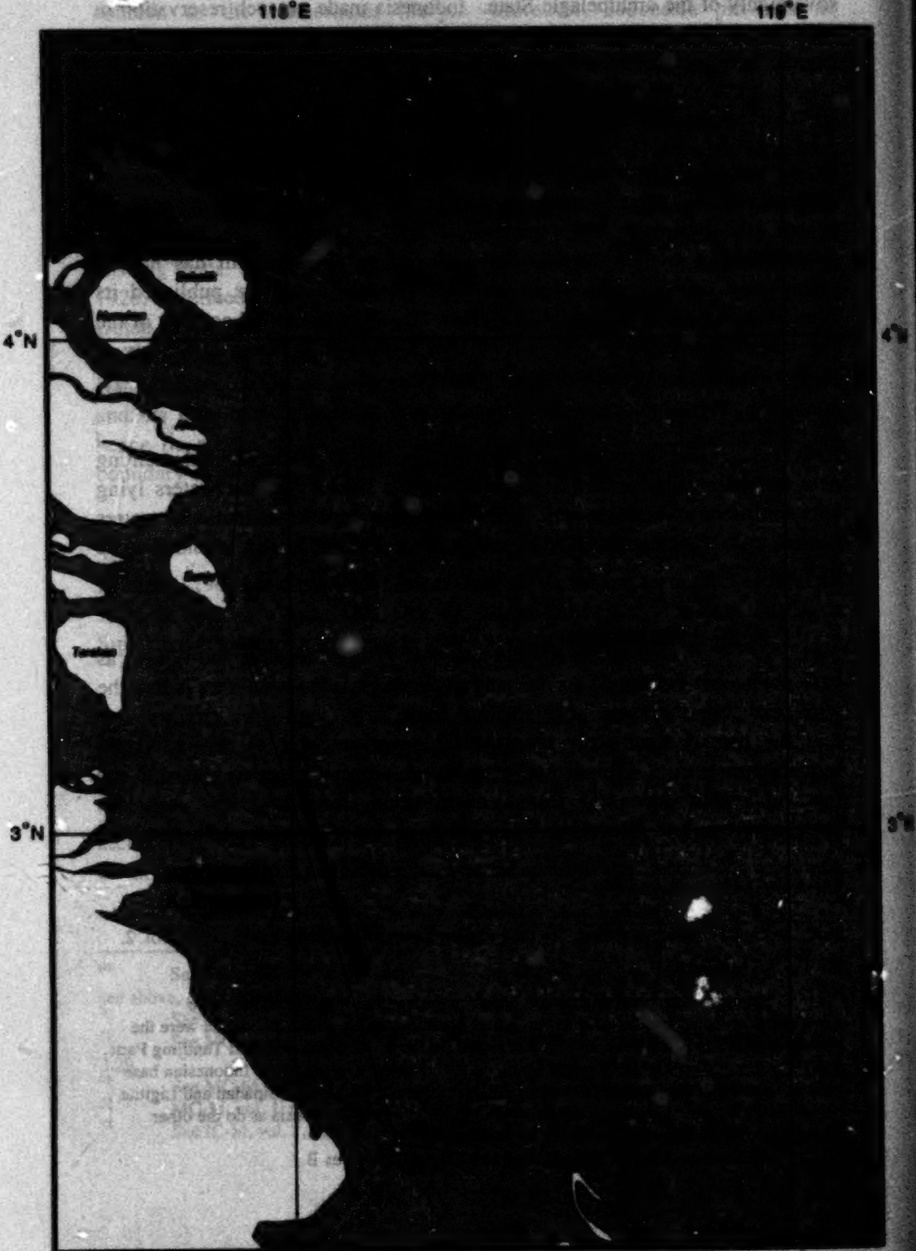
[76] See MM, vol. 5 Map 19.

[77] Indonesia has stated that certain islands not identified in the 1960 Act were nonetheless accepted by Malaysia as basepoints in subsequent negotiations. These were the islands of Pulan Tokoing Boro and Pulan Penjibu (in the South China Sea) and Tandjing Parit and Pulan Batu Mandi in the Malacca Strait. In fact they are so close to the Indonesian base lines as drawn that they would fall within the Indonesian territorial sea. Sipadan and Ligitan do not lie in the same geographical relationship to the coasts of Indonesia as do the other islands claimed by Indonesia in earlier negotiations.

[78] Affidavit of Admiral Adi Sumardiman, IM, vol. 5, Annex B.

## Insert 10

## Base Points 36, 36a, 36b, 37, 38 and 39 of the Indonesian Baselines (1960)



the Council of Ministers stating that "all waters around, between and connecting, the islands or parts of islands belonging to the Indonesian archipelago irrespective of their width or dimensions are natural appurtenances of its land territory and therefore an integral part of the inland or national waters subject to the absolute sovereignty of Indonesia".[79] Can the product of over two years preparation for the implementation of the 1957 announcement be called "the result of injudicious haste"? In a matter of such national importance, would the Indonesian authorities have worked on the basis of small-scale maps?[80] The truth of the matter is that the 1960 Law was carefully prepared over several years, was intended by Indonesia to be highly significant and was regarded internationally as such. To pretend now that it was prepared carelessly and in haste is absurd.

5.42. Nor does Indonesia grapple with the consequences that would have followed if Sipadan and Ligitan had replaced point 36b in the Indonesian baseline. The point can be seen from **Insert 10**, on the preceding page. Where would the line have run if Sipadan and Ligitan had been 36b and 36c respectively? Would it have run back to the present point 37 or would it have run to 38 or 39? If such possibilities existed of thus significantly enlarging the area of Indonesian national waters, does not the argument of injudicious haste and the use of small-scale maps ring even more hollow? Is not the more likely explanation that because of the absolute lack of contact both then and in earlier years between Indonesia and Sipadan and Ligitan, they were not thought of as belonging to Indonesia at all?

5.43. Indonesia seeks to compare the deficiencies of its 1960 claim with certain omissions from Malaysia's continental shelf maps. But the comparison is inexact. In contrast to Indonesia which was obliged to use its "outermost islands", no such obligation rested upon Malaysia. Malaysia's task was a much more limited one. In any case, as noted, Malaysia has never produced a base-line map and has, therefore, not made to Indonesia any representation comparable to those made by Indonesia.

5.44. Turning to Indonesia's treatment of the oil concessions granted by it, mention should be made of the misleading manner in which the subject is introduced: "The oil concessions issued by Indonesia *are the other instance mentioned by Malaysia* as allegedly showing an absence of administration by

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[79] See Whiteman's *Digest of International Law*, vol. 4, p. 284.

[80] The schedule to the 1960 Act (IM, vol. 4, Annex 128) contains a list of 201 points with names and coordinates specified. It was evidently prepared with care.

Indonesia after independence".[81] That is hardly the correct way of reflecting Malaysia's general contention that Indonesia has not performed *any* acts of administration of the islands after independence. It is not for Malaysia to prove a negative. The expression of Indonesia's claims to its archipelagic waters and its claim to potential oil-bearing areas are but two examples of Indonesia's conduct, selected because in those contexts we might have expected a more positive approach. But it is not necessary for Malaysia to list a whole range of activities that Indonesia might have pursued and then point out that Indonesia has not pursued any of them. Such limited items as Indonesia has mentioned have already been dealt with.[82] In its Counter-Memorial, Indonesia provides nothing more, nothing new.

5.45. In short, Indonesia's pretensions to activity demonstrating Dutch/Indonesian authority over the islands boil down to four episodes — one in 1876, when the HNLMS *Admiral van Kinsbergen* sailed near Sipadan, but not Ligitan; a second, in 1903, when HNLMS *Macassar* carried out some surveys of the coastal areas in North Borneo waters but seems not to have landed on the disputed islands; a third, in 1910, when HNLMS *Koetei* was present in the area, and a fourth, in 1921, involving HNLMS *Lynx*. This is not evidence of the exercise of governmental activity in and in relation to Sipadan and Ligitan indicative of any claim of title to the islands, let alone a claim that compares with the significant and continuing administrative acts of Britain and Malaysia relating to both islands.

### (3) Post-1969 Activities of the Parties

5.46. Malaysia notes Indonesia's acknowledgement that activities of the Parties after "the critical date... may confirm the legal situation existing when the dispute crystallised".[83] In fact in the present case Indonesia cites no governmental activities of any kind after 1969, while it admits that Malaysia has continued and intensified its administration of the islands (indeed, it complains of the fact). Even on the relatively restricted view taken by Indonesia of the scope of post-1969 activities,[84] it is the case that Malaysia's activities strongly confirm the legal situation existing in 1969.

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[81] IC-M, vol. 1, p.139,para.7.56 (emphasis added).

[82] MC-M, vol. 1, pp.93-95, paras. 4.46-4.48.

[83] IC-M, vol. 1, p.140, para.7.60.

[84] However tribunals have taken a more expansive view. In this connection, Malaysia strongly prefers the approach of the Tribunal in the *Palena* case, 38 ILR, at pp 79-80. There the President, Lord McNair, noted "that the Court has considered the notices of the critical date to be of little value in the present litigation and has examined all the evidence submitted to it irrespective of the date of the acts to which such evidence relates".

### (4) The map evidence

5.47. There is only one official map reflecting the agreed views of the two Parties: the map attached to the 1915 Agreement. On that map, the terminal point of the boundary line is on the east coast of the island of Sebatik. No continuation of the line out to sea is shown. The map is a vital indication of how the Parties interpreted and applied the 1891 Convention. Its importance has been fully analysed in Chapter 4.[85]

5.48. So far as the other maps are concerned, there appears to be no great difference between the Parties regarding the value of map evidence. As Indonesia has said: "... the map evidence is relevant in assessing what the views of the interested parties were with respect to the territorial situation in the area of concern".[86] Subject to the observations which it has made in its Counter-Memorial, Malaysia is able to accept this statement.[87] But the question remains: what do the maps actually show regarding the views of the interested parties with respect to the territorial situation in the area of concern?

5.49. In this connection, five maps in particular may be recalled. Each is an official map prepared by the government either in the Netherlands or the Netherlands Indies.[88] Their provenance, authenticity and effect cannot be questioned. Each of these maps clearly contradicts the Indonesian thesis and supports that of Malaysia. On each of the maps, the boundary line can clearly be seen as crossing the island of Sebatik and terminating on its eastern coast. In none of them does the boundary extend into the sea in such a manner as to allocate or attribute Sipadan and Ligitan to the Netherlands. The maps in question are the following:

(i) The Dutch "Survey Map of the Netherlands East Indies Archipelago", prepared in 1897-1904 by the Topographical Bureau at Batavia. This was described in and attached to the Malaysian Counter-Memorial.[89]

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[85] See above, paragraphs 4.46-4.57.

[86] IC-M, vol. 1, p.143, para.7.71.

[87] MC-M, vol. 1, pp. 117-121, paras. 5.31-5.39.

[88] Malaysia does not mean to disregard the Dutch "Explanatory Memorandum" map, prepared in 1891, which appears to form the basis of Indonesia's case. But Malaysia has commented on it at length (See MM, vol. 1, pp. 96-99, paras. 9.3-9.9 and MC-M, vol. 1, pp. 99-100, para. 5.8) and those comments need not be repeated here.

[89] MC-M, vol. 1, p. 103, para. 5.15, p. 101, Insert 10 and MC-M, vol. 2, Map 1.

(ii) The Dutch map published in 1905 by the Department of Hydrography of the Dutch Ministry of the Navy. This too was described and produced in Malaysia's Counter-Memorial.[90]

(iii) The first official map of the Southern and Eastern Division of Borneo, published in 1913.[91]

(iv) The map of the Administrative Structure of the Southern and Eastern Borneo Residence, 1913.[92]

(v) The 1905 Dutch map, updated in 1915.[93]

5.50. The clarity of the position demonstrated on these maps, which all show the boundary terminating at the east coast of Sebatik Island, cannot be questioned. They stand as official declarations of the Netherlands Government. They constitute a total and comprehensive rejection of the arguments founded by Indonesia as the basis of the 1891 Convention. The Indonesian contention that the 1891 Explanatory Memorandum map is of "considerable, if not dispositive, probative value"[94] simply cannot stand.

5.51. Compared to this impressive and consistent series of maps, those introduced in the Indonesian Counter-Memorial as "Certain Key aspects of the Map Evidence"[95] provide no support for the Indonesian case. In particular, it is difficult to understand why Indonesia should have wished to give such prominence to one map that so clearly contradicts its own position. It hangs a complex interpretation upon Stanford's 1903 map.[96] This is said to be "highly pertinent" because it "depicted the southern limits of Elphinstone Province as extending seaward from the Island of Sebatik along the 4°10' N line of latitude to a point to the north and east of the islands of Sipadan and Ligitan".[97] However, what Indonesia has chosen to overlook is the fact that the heavy red line that depicts the agreed international boundary clearly terminates at the east coast of Sebatik Island. Whatever the map may show about the administrative limits of Elphinstone Province is of no importance when the line that marks the international boundary is so clearly defined. Substantially the same map, published by Stanford in 1906,[98] was used to illustrate the 1907

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[90] MC-M, vol. 1, p.103, para. 5.14; vol. 2, Map 2.
[91] MM, vol. 5, Map 1; see also MM, vol. 1, pp. 4,108, paras. 2.6, 10.5.
[92] MC-M, vol. 1, p.103, para.5.15 and Insert 11.
[93] See MC-M, vol. 1, p.103, para.5.15 and MC-M, vol. 2, Map 3.
[94] IC-M, vol. 1, p.144, para.7.73.
[95] Ibid.
[96] IC-M, p.145, para.7.74, For the map see IM, vol. 1, map 6.4, opposite p. 119, IC-M, vol. 1, map 4.1, opposite p. 55.
[97] IC-M, vol. 1, p.145, para.7.74 (a).
[98] See MM, vol. 5, Map 6.

Exchange of Notes between Britain and the United States,[99] and once again it showed the international boundary as ending on the east coast of Sebatik Island. Moreover, this map, though clearly showing Elphinstone Province, as in the 1903 map, does not show any southern limit to that Province drawn in the sea.

5.52. Indonesia devotes considerable attention to one Malaysian map which, in its view, "merits particular attention" — the map published by the Malaysian Ministry of Lands and Mines in 1968.[100] It claims to see in this map, as well as in others, a representation of the seaward extension of the 4° 10' line as the international boundary and maintains that these maps constitute an admission against interest by the Malaysian Government.[101] But this is a highly generalised map which does not show any islands south of Semporna at all.[102] In any event, the important point to note is that Indonesia sees the significance of these maps as showing that "Malaysia was of the view that a line of territorial allocation existed with Indonesia in the area and that that line was the boundary fixed by the 1891 Convention".[103] Indonesia thus sees these maps as contributing to the *interpretation* of the 1891 Convention. It does not see the Malaysian maps as introducing a modification of that Convention, nor could it have done so. It is necessary, therefore, to weigh against each other the interpretative value of the maps invoked by each side. Such a process of weighing must lead, in Malaysia's submission, to the conclusion that the maps cited by Malaysia — particularly the cardinal maps identified in paragraph 5.48 above — overwhelmingly support the position understood by both Parties to the 1891 Convention, viz. that the boundary line stopped at the east coast of Sebatik Island and did not allocate to the Netherlands/Indonesia any islands further east.

5.53. In conclusion, some comment is required in respect of Indonesia's attempt to deny significance to the fact adduced by Malaysia that so many maps show the 1891 line as not extending out to sea. Indonesia's position is that "these maps are entirely neutral with respect to the territorial attribution of the islands of Sipadan or Ligitan".[104] Malaysia finds it hard to reconcile this statement with what follows only five paragraphs later[105] where Indonesia appears to be restating its fundamental position, namely, that "it was no accident that the line was placed on key maps of the area. Its persistent appearance... conclusively confirms Indonesia's sovereignty over the islands of Sipadan and Ligitan".[106] Malaysia has always understood Indonesia's basic argument to be that the boundary runs seaward along the line of 4° 10' N because that was what was represented on the 1891 Explanatory Memorandum map. Are we now being told that the non-appearance of the boundary line beyond the east coast of Sebatik Island does not matter?

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[99] See MM, vol. 1, p.109, para. 10.8.

[100] IC-M, vol. 1, p.146, para.7.76.

[101] IC-M, vol. 1, p.147, para.7.80.

[102] As noted in MC-M, vol.1, pp.88-93,109, paras. 4.37-4.45, 5.21.

[103] IC-M, vol. 1, p.148, para. 7.84.

[104] IC-M, vol. 1, p.149, para. 7.88.

[105] IC-M, vol. 1, p.151, para. 7.93.

### C. The Legal Significance of Long-extended British/Malaysian Conduct

5.54. The facts of the matter are thus clear. Malaysia and its predecessors in title have administered the two islands, as well as others in the vicinity, since the late nineteenth century. Indonesia and its predecessors in title have not done so, and until 1969 gave no appearance of even an abstract claim to do so. What are the legal consequences to be drawn from these facts?

5.55. The first point to note, of course, is the conjunction of the facts of long-standing Britain and Malaysian administration of the islands and the grant to Malaysia's predecessors, Britain and the BNBC, of title over them. With the conclusion of the 1930 Convention, the only other State with any claim to the islands, the United States, stepped out of the picture, and British/Malaysian authority over the islands was not challenged then for nearly 40 years.

5.56. But for the sake of argument, let us consider what the position would be on a strictly bilateral basis, as between Britain and the Netherlands or, now, as between Malaysia and Indonesia, leaving to one side all considerations of the significance of the transactions with the United States in the period 1903-1931. Even on that (hypothetical) basis, British and now Malaysian sovereignty over the islands would be clearly established. The legal significance of the presence in the islands of Malaysia and its predecessors would derive from the now widely recognised concept of historical consolidation of title.

5.57. Some remarks on the subject expressed by Sir Robert Jennings in his authoritative work on *The Acquisition of Territory in International Law* may usefully be recalled at this point:

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[106] Ibid.

### "HISTORICAL CONSOLIDATION OF TITLE

This ambiguity in actual cases based essentially on effective possession suggests the question whether the various factors contributing to building a title cannot usefully and instructively be subsumed under the one heading of a process of 'consolidation', and regarded as being for essential purposes all part of one legal process, or 'mode' of acquisition of territorial sovereignty. This possibility has been advocated by Professor Charles de Visscher, elaborating a formula used in the *Norwegian Fisheries* case... The passage is of such importance that it may be useful to cite it at some length:

> '4. *Consolidation by Historic Titles.* The fundamental interest of the stability of territorial situations from the point of view of order and peace explains the place that consolidation by historic title holds in international law and the suppleness with which the principle is applied. It is for these situations, especially, that arbitral decisions have sanctioned the principle *quista non movere*, as much out of consideration for the importance of these situations in themselves in the relations of States as for the political gravity of disputes concerning them. This consolidation, which may have practical importance for territories not yet finally organised under a State regime as well as for certain stretches of sea-like bays, is not subject to the conditions specifically required in other modes of acquiring territory. Proven long use, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given State. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the judge to decide *in concreto* on the existence or non-existence of a consolidation by historic titles.'

... Thus, as Professor Johnson says, Professor de Visscher has 'embraced under a single heading the notion of straightforward possession on the one hand and of adverse possession on the other hand...' Under the single heading of 'consolidation' it is now possible... to include both 'straightforward possession' and 'adverse possession'...

Now it must be acknowledged at once that this passage from Professor de Visscher's analysis is not just a suggestion *de lege ferenda*; it is a penetrating and illuminating observation of the

> way Courts actually tackle questions of title to territorial sovereignty. Thus it makes clear how recognition in varying forms, and acquiescence, and estoppel perhaps are given an important place in this scheme of things; and this is no doubt right.
>
> ...it must be emphasised that however important all these various consolidating factors may be, it is still the fact of possession that is the foundation and the *sine qua non* of this process of consolidation.
>
> ...It should be made quite clear, therefore, that the process of consolidation cannot begin unless and until actual possession is already an accomplished fact and that, although no time is laid down, it remains true that it cannot be completed until after a considerable period of possession as of a sovereign.
>
> ... the whole tendency of consolidation is to make the origin of the possession of ever-diminishing importance. No doubt this is in a sense realistic.
>
>> ... What is of decisive importance... is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the *Ecrehos and Minquiers* groups."[107]

5.58. A recent acknowledgement of the concept of consolidation is to be found in the first Award of the eminent Arbitral Tribunal in the *Eritrea/Yemen* case.[108] There, the Tribunal said that "Evidence of intention to claim the islands *à titre de souverain* is an essential element of the process of *consolidation* of title".[109] This passage relates back to an earlier one where the Tribunal said:

> "The modern international law of the acquisition (or attribution) of territory generally requires that there be an intentional display of power and authority over the territory, by the exercise of jurisdiction and State functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any".[110]

It is this concept which underlies Malaysia's reliance upon "long, peaceful and undisputed administration" of the islands.[111]

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[107] *The Acquisition of Territory in International Law*, Manchester, Manchester University Prress, 1963, pp. 23-27. The concept has been more recently affirmed in *Oppenheim's International Law* (9th edition, by Jennings and Watts, 1992), pp. 709-710, para. 272.

[108] 114 ILR at p. 69, paras. 239-241.

[109] Ibid., para. 241 (emphasis added).

[110] Ibid., para. 239.

[111] MM, vol.1, p.60, para. 6.3.

5.59. Indonesia seeks to escape from the crippling impact of the history of the islands by pretending that "the entire reasoning behind Malaysia's argument is based on a fundamentally flawed premise: that Indonesia lacks territorial title to the islands". It is true that Malaysia asserts, in the first place, that Indonesia and before it the Netherlands not only lacks title to the islands but also that neither of them ever possessed it. What Malaysia does not accept is that this assertion by Malaysia is "fundamentally flawed".

5.60. Another remarkable feature of Indonesia's argument is its reservation of "its position on the question of whether a transfer of sovereignty may result from a long period of undisputed occupation".[112] This statement amounts, in effect, to abandonment of any response by Indonesia to that aspect of Malaysia's case based on long and undisputed occupation and administration of the islands. It is a strange reservation to make in a pleading which, if Indonesia's basic contentions regarding its sovereignty were correct, should have been supported by detailed consideration of precisely this question.

5.61. Indonesia seeks to introduce further confusion into the case by stating that "further discussion on this point [that is of the effect of acquisitive prescription or the consequences of undisputed occupation] is of little relevance given that Malaysia specifically dismisses this line of argument".[113] Once again Indonesia significantly misstates Malaysia's argument. Far from excluding recourse to prescription, Malaysia specifically asserts it as an *alternative* argument.[114] In a sentence that immediately follows the one quoted but disregarded by Indonesia, Malaysia expressly said: "Only if the Court should find that somehow the Netherlands had acquired title to the islands at some earlier stage, would Malaysia need to invoke prescription as the basis for converting its long time possession into a prescriptive title."[115]

5.62. In short, Malaysia has from the beginning made it clear that its demonstration of Malaysian *effectivités* over the islands serves a dual function: first, it confirms Malaysia's title which is independently based on a series of valid legal instruments; second, even if — in a manner by no means clear or established — the Netherlands had at one time possessed title to the islands, such title has been displaced by British/Malaysian *effectivités* over the years.

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[112] IC-M, vol. 1, p.122, para. 7.5.
[113] IC-M, vol. 1, p.122, para. 7.5.
[114] MM, vol. 1, pp. 29,60, paras. 5.1, 6.1.
[115] MM, vol. 1, p.60, para. 6.3.

5.63. Indonesia goes so far as to express doubts about the validity of the concept of acquisitive prescription in international law.[116] The authorities cited in support of this suggestion have been relegated by Indonesia to a footnote, and Malaysia will respond to them in the same manner.[117] The real

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[116] Ibid.

[117] (i) Indonesia refers, first, to Judge Moreno Quintana's dissenting opinion in the case concerning *Rights of Passage over Indian Territory* where he said that acquisitive prescription was "a private law institution which I consider finds no place in international law". However, it is clear from the context that in Judge Moreno Quintana's understanding the majority of the Court did accept the concept of acquisitive prescription. On examining the relevant paragraph in his dissenting opinion it may be observed that the sentence in question follows his own statement that "there follows from the majority opinion a legal premise that I cannot accept". And he continued: "... it implies by definition a recognition that territorial sovereignty can be acquired by prescription". This citation, far from strengthening Indonesia's argument, serves only to weaken it.

(ii) The *Kasikili* case – Indonesia invokes the Court's allegedly "cautious approach" in the *Kasikili* case as supporting Indonesia's doubts about the existence of the concept of acquisitive prescription in international law. In truth, however, the Court expressed no view about acquisitive prescription beyond saying that it "need not concern itself with the status of that concept" since the conditions cited by Namibia itself were not satisfied in this case.

(iii) Nor is Indonesia assisted by the citation of "the careful consideration of the issue in the edition of Oppenheim's *International Law* by Sir Robert Jennings and Sir Arthur Watts". Nothing could be clearer than the following statement that appears at p. 706:

> "... Again, others, whilst not requiring possession from time immemorial, held that undisturbed continuous possession could under certain conditions produce a title for the possessor, if the possession had lasted for some length of time. This latter opinion seems to be in accordance with practice. There is no doubt that, in international practice, a state has been considered to be the lawful owner even of those parts of its territory of which originally it took possession wrongfully, provided that the possessor has been in undisturbed possession for so long as to create the general conviction that the present condition of things is in conformity with international order. Prescription in international law was therefore defined in the previous edition of this work, as *the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.*" (Emphasis in original)

In short, the view expressed in Oppenheim clearly favours the existence of the concept of acquisitive prescription, though it acknowledges that no general rule can be laid down as regards the length of time and other circumstances necessary to create such a title by prescription. "Everything depended upon the individual case." (Oppenheim, p. 706, para. 270). Malaysia will shortly review the activities of Britain and Malaysia against the conditions mentioned in Oppenheim. This review will show that, in so far as prescription should need to be claimed as an element in Malaysia's title (which is not admitted), the relevant conditions are fully satisfied.

What has just been said about the acknowledgement of the existence of the concept of acquisitive prescription is fully borne out by the references made by Indonesia in the same footnote to the works of Professor Brownlie and Dr Kohen. Thus, so far as Professor Brownlie is concerned, the denial of the existence of a doctrine of acquisitive prescription is essentially a reason why Indonesia objects to the operation of prescription, and indeed of any other assessment of title based on the conduct of Britain and Malaysia, is that, quite simply, Indonesia has no facts that it can employ to counter the legal effects of the long administration by Britain and Malaysia of the islands in question.

5.64. Malaysia does not consider it necessary to enter into a discussion of whether its acts are of a nature to displace or to confirm an existing title. Such a discussion, at any rate as presented by Indonesia,[118] assumes what it has to prove, namely, that Indonesia at a material time possessed title to the two islands. But all that matters for the purposes of the present case are the facts of prolonged British and Malaysian conduct and of the absence of any material Dutch or Indonesian conduct. Malaysia intends no disrespect to the Court in submitting that the distinctions drawn by the Chamber of the Court in the *Frontier Dispute* case between Burkina Faso and Mali[119] do not assist in the present case. This is the more true when, in identifying which of the four hypotheses suggested by the Court is applicable to this case, Indonesia takes as its starting point the very conclusion that it has to reach, namely, that it is the holder of the legal title.

## D. Conclusion

5.65. It remains only to recall the activities of Britain and the Netherlands, as well as of the Parties themselves, that show that the requirements for historical consolidation of title, no less than of prescription, (insofar as this needs to be invoked) mentioned in Oppenheim[120] have been

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semantic objection, (he himself later admits that "the question ends as a matter of terminology"), since he quite clearly accepts that rights comparable to acquisitive prescription may be derived from acquiescence and estoppel. Indeed, he sets out a number of conditions for acquisitive prescription. These are that possession must be expressed *à titre de souverain*, must be peaceful and uninterrupted, must be public, and must persist. As will be seen, all these conditions are satisfied if the conduct of Britain and Malaysia needs be to viewed in terms of acquisitive prescription.

Finally, Indonesia refers to "the very comprehensive presentation of the whole problem" by Dr Kohen. The reference scarcely supports Indonesia's attack upon the concept of acquisitive prescription in a manner that is of any value to Indonesia. Although Dr Kohen objectively describes the various points of view on the subject, the most important part of his presentation is the section on "*La Jurisprudence*" (pp. 60-68). This makes it clear that whatever words may be used to describe the process, international tribunals will accept the conduct of one State as capable of defeating the title of another (if ever it existed) by reference to the nature of the conduct, its duration, the attitude and behaviour of the other State concerned and the views of third States.

[118] As is suggested by IC-M, vol.1, p.122, para. 7.5.

[119] IC-M, vol.1, p.123, para. 7.8.

[120] See above, note 116 (iii).

satisfied. Britain, from before 1891, and Malaysia, since 1963, have exercised sovereignty over the islands continuously, peacefully and without disturbance. The Netherlands and, more recently Indonesia, have never exercised any degree of sovereignty over the islands. The period during which this sovereignty has been exercised has endured for the best part of a century even before the year 1969 which Indonesia claims is the "critical" date.

5.66. There is no doubt that amongst the States most closely concerned, particularly Spain and the United States, there has been a general conviction that the present condition of things is in conformity with international order. Indeed, as the Court will no doubt have remarked, during the period since the taking in 2000 by terrorists of a number of hostages from Sipadan, the episode has always been referred to in the world press as having occurred on the *Malaysian* island of Sipadan. The evidence of this recognition has been provided by Indonesia itself in a passage in which it mentions the many protests that it has felt obliged to issue in relation to press reports in France, Belgium, Thailand, Republic of Korea, Singapore, India and Saudi Arabia[121] which have uniformly described Sipadan as Malaysian.

5.67. In short, the facts, in and of themselves, show conclusively that Sipadan and Ligitan belong to Malaysia.

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[121] IC-M, vol. 1, p.142, para.7.69 and vol. 2, Annex 35.

## SUBMISSIONS

In the light of the considerations set out above, Malaysia respectfully requests the Court to adjudge and declare that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia.

Datuk Abdul Kadir Mohamad

Agent of Malaysia
Kuala Lumpur

2 March 2001

# Annex 1

**Extract from mail report dated 23 June 1879 from Resident Meijer of Southern and Eastern Division of Borneo to Governor-General of the Netherlands East Indies, reporting on a mission of the Assistant Resident at Koetei to the Eastern Coast of Borneo**

Source: ARA, *Min. of Col., Mail Reports 1879*, Microfiche 585, No. 400, [sheet no. 2]

Extract of the text in Dutch:

"Uit verder ingewonnen informatie bleek, helaas, dat de kuststrook van Seboekoe tot aan den Batoe Tinagat geheel onbewoond is en zich slechts diep in het gebergte Daijaksche stammen ophouden. Ook de bewoners van Seboekoe zouden dat eiland verlaten en zich in de benoorden Gerbang gelegen kampong Sagangan gevestigd hebben, terwijl de bevolking van het eiland Nanoekan zich naar Boeloengan terug getrokken heeft.

Volgende dag verder reis naar Batoe Tinagat voortgezet met het doel om plaatselijk te onderzoeken of die streek werkelijk onbewoond was.... De 24e werd met een gewapende sloep de Tawaurivier opgevaren doch nergens enig spoor van een nederzetting ontdekt, zodat geen gevolg is kunnen worden gegeven aan het verlangen der Regering om verklaringen af te nemen van en Nederlandse vlaggen uit te reiken aan hoofden van nederzettingen of kampongs...."

Translation by Malaysia:

"From additional information gathered, it appeared unfortunately that the coastal area from Sebuku up to Batu Tinagat is totally uninhabited and that only deep into the mountain area there are Dayak tribes. Also the inhabitants of Sebuku have reportedly left this island and settled in the kampong Sagangan situated north of Gerbang, while the population of the island of Nunukan has withdrawn to Bulungan.

Next day we traveled on to Batu Tinagat in order to investigate on the spot whether this region was indeed uninhabited.... On the 24th we ascended the Tawau river by armed sloop but failed to find any trace of a settlement, so that no effect could be given to the wish of the Government to record declarations from the Chiefs of settlements or kampongs and to issue Dutch flags to them...."

**Annex 2**

Source, ARA, Min. of Col., Mail Report [illegible]

E[illegible] of the text in Dutch

"Uit verder ingewonnen informatie bleek, helaas, dat de kuststreek van [illegible] tot aan het Batoe Tinagat gebied onbewoond is [illegible] in het gebergte [illegible] Ook de bewoners van [illegible] verlaten en zich in de [illegible] Gerbang gelegen kampong [illegible] gevestigd hebben, terwijl de bevolking van het eiland Noenoekan zich naar [illegible] terug getrokken heeft.

Volgende dag verder reis naar Batoe Tinagat voortgezet met het doel om persoonlijk te onderzoeken of die streek werkelijk onbewoond was... De 24e werd met een gewapende sloep de Tawaurivier opgevaren [illegible] spoor van een nederzetting [illegible], zodat geen gevolg is kunnen worden gegeven aan het verlangen der Regering om verklaringen af te nemen van en Nederlandsche vlaggen uit te reiken aan hoofden van nederzettingen of kampongs..."

Translation [illegible]

"From additional information gathered, it appears, [illegible], that the coastal area from [illegible] up to Batu Tinagat is [illegible] and that only deep into the mountains [illegible] Dayak tribes. [illegible] have reportedly left this island and settled in the kampong [illegible] north of Gerbang, while the population of the island of Nunuk [illegible]."

**Extract from the log-book of HNLMS *Koetei* for 27 September 1910**
Source: ARA, *Min. of Navy*, 2.12.03, inv. No. 2336

Extract of text in Dutch reads:

"Houden peiling bestek van eilanden en omgeving St Lucia-baai. Stoomen op peiling tusschen Oost-Noenoekan en Sibetik door. Zijn te 10 u 30 dwars van Steenenhoek. Te 12 u van Deliberg. Houden lood aan S.B. gaande. Komen te 12u 45 ten anker voor 35 vm B.B. in 10 ¼ vm water bij grenslijn. Bepalen zeewacht."

Translation provided by Malaysia:

"Determining the position of island and the surroundings of St. Lucia Bay. Steaming onwards on bearing between East Nunukan and Sebatik. At 10.30 hrs a.m. athwart *Steenenhoek*. At 12 hrs athwart *Deliberg*. Keeping the sounding-lead at starboard. At 12.45 p.m. anchoring with 35 fathom abeam at portside in 10 1/4 fathom water near the boundary line. Fixing the watches.

Hr. Ms. Koetei van

Dinsdag, den 27ste Sept 1910 In

DAMPKRING en ZEE

Wind

Stand

Hr. Ms. Koetei [illegible] van

Dinsdag, den 27ste Sept. 1910 In

DAMPKRING en ZEE.

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| II | Z.W. | F.K. | 2 | bew. | K. | c/ | 6 | 31/40 | 1710 | 125 | 329 | 338 | 16 |
| IV |  |  |  |  |  |  |  |  |  |  |  |  |  |
| I | W.N.W. | F.K. | 2 | bew. | K. | c.y. | bw | 32/40 | 1800 | 120 | 329 | 338 | 10 |
| I |  |  |  |  |  |  |  |  |  |  |  |  |  |
| II | W. | B.K. | 4 | Regen | 7 |  |  |  |  |  |  |  |  |
| IV |  |  |  |  |  |  |  |  |  |  |  |  |  |

Woensdag 28 Sept. 1910.

|  |  |  |  |  |  |  |  |  |  |  |  |  |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| I | — | B.K. | 4 | [illegible] | K.9 | c/ | — | 30/40 | [illegible] | 125 | 3000 | 282 |
| I |  |  |  | l. bew. |  |  |  |  |  |  |  |  |
| III |  | F.K. | 4/3 |  |  |  |  |  |  |  |  |  |
| IV |  |  |  |  |  |  |  |  |  |  |  |  |
| I | [illegible] | F.K. | 4/5 | [illegible]<br>goed weer | K. | c/ | [illegible] | 31/40 | 1900 | 120 | [illegible] | 4 |
| II |  |  |  |  |  |  |  |  |  |  |  |  |
| III |  |  |  |  |  |  |  |  |  |  |  |  |
| IV |  |  |  |  |  |  |  |  |  |  |  |  |

[illegible]

[illegible]

[illegible] naar [illegible]

DATUM

Koers

VERRICHTINGEN, VOORVALLEN en BIJZONDERHEDEN

Lamamuke naar Luccarbeu

| DATUM | | | | Koers | | | VERRICHTINGEN, VOORVALLEN EN BIJZONDERHEDEN | COMMANDANT |
|---|---|---|---|---|---|---|---|---|
| 4-8 | | | | 3275 | 330 | 18 | Vervolgen koers N 330° O [illegible] [illegible] gepeild [illegible] | [illegible] |
| 8-12 | | | | 3370 | 330 | 22 | Vervolgen koers N 330° Oost [illegible] [illegible] [illegible] | |
| Bep. pl. middag<br>2°-26.3 N Br.<br>118°-25' O L. | | | | | | | [illegible] | |
| 12-4 | | | | 3425 | 345 | 22 | Vervolgen koers N 345° O (r.w.). [illegible] gewichtige bijzonderheden. Bij afgaan der wacht geen zicht van wal of schepen.<br>O. J. [illegible] | |
| Bep. pl. 4 u.<br>3°-17.6 N Br.<br>118°-26' O L. | | | | | | | | |
| 4-8 | | | | 3450 | | | [illegible] | |

5

Extract from report on activities paddle steamer Sesajak, dated 16 October 1881
Source: ARA, Min. of Navy, 2.12.01, inv. No. 2798

## Annex 3

Relevant part of the report in Dutch reads:

Folio 30 A: "De Sesajak stoomde nu den 19e neder af en daarna door de Mocara Sebuku naar zee. Onder N. koersende bereikte men den daaropvolgenden dag de passage tusschen Oost-Noenoekan en Sebatik en zoo de uiterste grens van ons gebied. Den 22e werd de terugtocht aangevangen, den 24e de Koetei-rivier opgestoomd en den volgenden dag te Samarinda geankerd"

Translation provided by Malaysia:

"On the 19th they steamed seawards down the Sebuku and subsequently through the Sebuku estuary. The next day, sailing north about they reached the passage between East Nunukan and Sebatik and thus the outer limit of our territory. On the 22nd they started on the return journey, on the 24th they steamed into the Koetei river and the next day they anchored at Samarinda."

**Extract from report on activities paddle steamer *Soembing*, dated 16 October 1891**
Source: ARA, *Min. of Navy*, 2.12.01, inv. No. 2703.

Relevant part of the report in Dutch reads:

Folio 20 A: "De Sesajab stoomde men den 19e neder af en daarna door de Moeara Salindarin naar zee. Om de N. koersende bereikte men den volgenden dag de passage tusschen Oost-Noenoekan en Sebetik op en alzoo de uiterste grens van ons gebied. Den 22' werd de terugtocht aangenomen, den 24e de Koetei-rivier ingestoomd en den volgenden dag te *Samarinde* geankerd".

Translation provided by Malaysia:

"On the 19th they steamed seawards down the *Sesajab* and subsequently through the *Moeara Salindarin*. The next day, sailing north about they reached the passage between East Nunukan and Sebatik and thus the outer limit of our territory. On the 22nd they started on the return-journey, on the 24th they steamed into the *Koetei* river and the next day they anchored at *Samarinda*".

Het Zr. Ms. [illegible] "[illegible]" onder bevel van den kapitein luitenant ter zee [illegible] te Ternate en [illegible] in het [illegible] van [illegible]

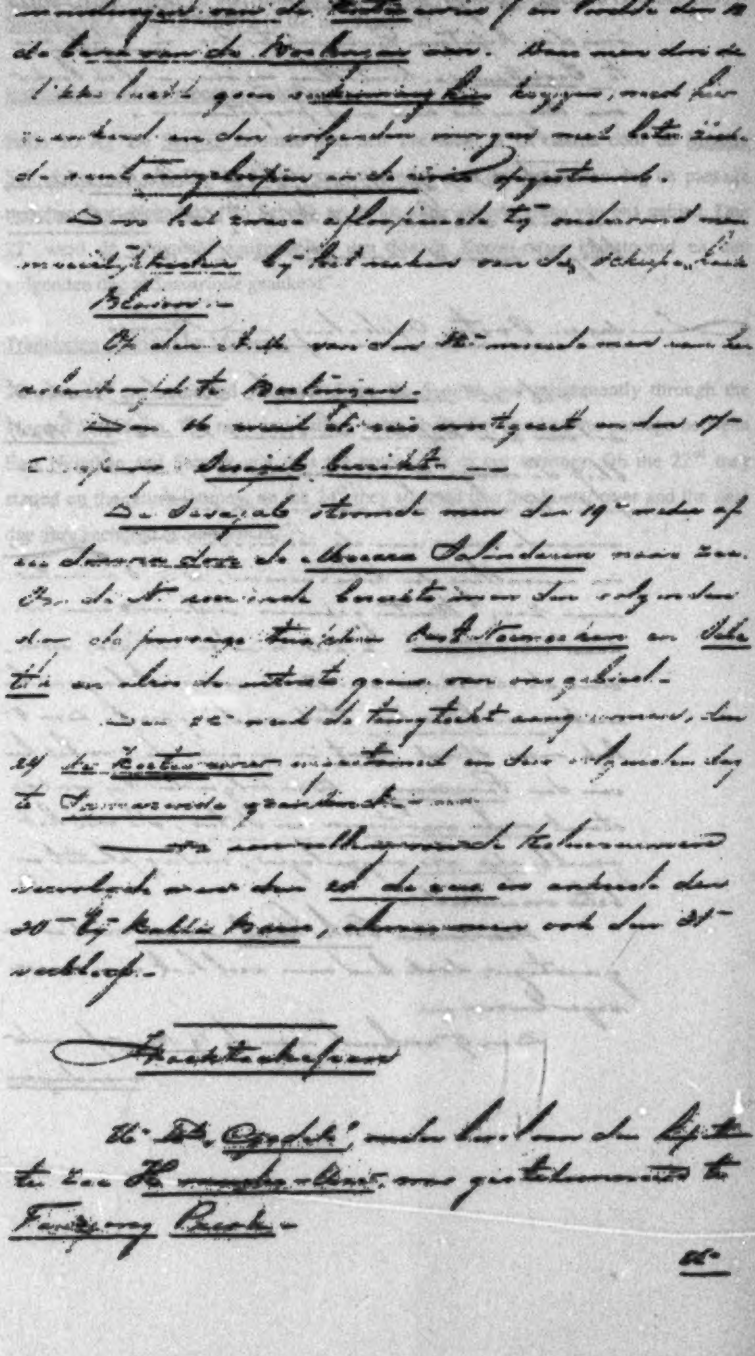
Het Zr. Ms. [illegible] "[illegible]" gecommandeerd door den Luitenant ter zee 1e klasse [illegible] bleef de [illegible] op de [illegible]

## Zuider en Ooster Afdeeling van Borneo

Het Zr. Ms. [illegible] "[illegible]" onder bevel van den kapitein luitenant ter zee [illegible] bleef de eerste dagen van den 20 [illegible] der maand Julij ter reede van de hoofdplaats. Den 21e [illegible] Z.Z.O. [illegible] Den 4e [illegible] van den Pangeran. Den volgenden dag werd de [illegible]

[illegible]

Den [illegible]



[illegible] van de Kaston-rivier / en bleef den 10 [illegible] de baai van de Boelongan over. Daar men door de [illegible] geen [illegible] kon krijgen, werd het [illegible] en den volgenden morgen met [illegible] de [illegible] ingeloopen en de rivier opgestoomd.

Door het [illegible] afloopende tij [illegible] moeielijkheden bij het maken van [illegible]

Op den [illegible] van den 15 [illegible] te Boelongan.

Den 16 werd de reis voortgezet en den 17 [illegible] Sesajab bereikt. —

De Sesajab stoomde men den 19 [illegible] af en [illegible] door de Moeara [illegible] naar zee. [illegible] bereikte men den volgenden dag de passage tusschen [illegible] en [illegible] en [illegible] van [illegible] gebied.–

Den 22 werd de terugtocht aangevaard, den 24 de Kaston-rivier [illegible] en den volgenden dag te Samarinda [illegible].

[illegible] verliet men den [illegible] en ankerde den 30 bij Kalli [illegible], [illegible] ook den 31 [illegible].–

## [illegible]

Zr. Ms. „Cycloop", onder bevel van den Kapitein ter zee H[illegible], was gestationeerd te Tandjong Priok.–

[illegible]

## Annex 4

## Letter from Vice-Admiral Umbgrove to Governor-General Netherlands East Indies, dated 4 January 1922

Source: ARA, *Min. of Col.*, 2.10.36.04, inv. No. 2495.

Translation provided by Malaysia:

Copy:

Department of Navy
in the Netherlands East Indies

Weltevreden, 4 January 1922

To H.E. the Governor-General
of the Netherlands East Indies

As a follow-up to my letters dated 8 December N. 12329/VIII, 1 December No. 12096/VIII and 26 November No. 11934/VIII, I have the honour respectfully to send you an extract from the report of the Commander of HMS *Lynx* with the account of the controller of Bulungan belonging to it.

When now considering this question, I have the impression that the wording of the second cable dated 15 November of the acting Resident at Bandjermasin in which reference is made among other things to unreliable objectives, is causing the question to look somewhat gloomy. Nevertheless, I learn that great importance should be attached to the visit of HMS *Lynx* with the aeroplane to Tarakan and surroundings as a demonstration of authority. After taking note of these reports I take the view that there is every reason to act upon this incident as I thought I had indicated in my letter dated 8 December No. 12329/VIII.

I may be allowed to raise in this context one other matter which according to me deserves to be addressed. In the Convention concluded between the British and Dutch Governments (see Decree of the Governor-General, published in *Staatsblad* 1916 No. 145) concerning the boundary line between the Netherlands and the British protectorate in Borneo no boundary line is set forth which separates the territorial seas of the Netherlands and the protectorate in question.

When searching for Bajau fleets near Tarakan it was naturally necessary for the Commander of HMS *Lynx* to be familiar with the course of the boundary. At that time I decided that he should consider a prolongation of the land boundary to be the northern boundary of the territorial sea of Sebatik.

Yet it occurs to me that this matter which shows some similarity to the question how the course of the boundary should be in the Wielingen, should be settled in definite terms. Also in cases of maintenance of neutrality an unsettled situation cannot be accepted with a view of the great interest of St Lucia bay (petroleum fields).

Hence. I suggest that your Excellency should propose for government at the highest level to take steps to supplement the Convention in question to that effect.

The Vice Admiral
Commander of the Naval Forces and Head of the Department of the Navy in the Netherlands East Indies
(signed) W.J.G. Umbgrove
for a similar copy
the government's secretary (signed).

**Afschrift.**

Departement der Marine
in Nederlandsch Indie.

N: 106/XIII

Weltevreden, den 4den Januari 1923.-

Ik heb de eer Uwer Excellentie ten vervolge op mijne brieven dd. 8 December No.12229/VIII,[1] 1 December No.12096/VIII[2] en 26 November No.11934/VIII[3] hierbij beleefd aan te bieden extract uit het schrijven van den Commandant van Hr. Ms. "Lijnx" met bijbehoorend relaas opgemaakt door den controleur van Boelongan.

Mailrapp. 11/21; Mailrapp. 47/21 Mailrapp. 1/21 Mailrapp. 1/21.

Deze aangelegenheid thans beschouwende krijg ik den indruk dat de bewoordingen van het tweede telegram dd. 15 November j.l,[4] van den fd. Resident te Bandjermasin waarin o. m. ~~gesomen~~ gewaagd worden van onbetrouwbare bedoelingen, de zaak wel wat donker hebben weergegeven. Toch vermeen ik dat aan het bezoek van Hr. Ms. "Lijnx" met het vliegtuig aan Tarakan en omgeving als gezagsdemonstratie groote waarde moet worden toegekend. Het wil mij na kennisneming dezer rapporten voorkomen dat er alle aanleiding bestaat ter zake van het gebeurde te handelen als ik in mijn brief dd. 8 December j.l. No.12229/VIII in overweging meende te moeten geven.

Het zij mij vergund nog eene aangelegenheid hierby ter sprake te brengen welke m. i. voorziening behoeft. In het tractaat tusschen de Britsche en de Nederlandsche Regeering gesloten (zie Besluit van den Gouverneur Generaal, vervat in

Staatsblad

Aan
Zijne Excellentie den Gouverneur Generaal
van Nederlandsch Indie.-

----------

Staatsblad 1916 no.145) betreffende de grenslijn tusschen Nederland en het Britsch protectoraat op Borneo is niet vermeld de grenslijn die de terr. zee van Nederland en bedoeld protectoraat scheidt.

Bij het zoeken naar de [illegible]uvloten nabij Tarakan was het uiteraard noodig dat de Commandant van Zr. Ms. "Lijnx" bekend was met het beloop dier grens. Ik heb toen bepaald dat hij de verlengde landgrens als noordgrens de terr. zee van Sibatik had te beschouwen.

Het wil mij echter voorkomen dat deze aangelegenheid, welke eenige overeenkomst vertoont met de kwestie hoe de terr. grens in de Wielingen behoort te loopen, definitief moet worden geregeld. Ook in gevallen van neutr. handhaving kan een ongeregelde toestand met het oog op het groote belang der St.Lucia baai (petroleum terreinen) niet worden aanvaard.

Ik moge Uwer Excellentie mitsdien in overweging geven het opperbestuur voor te stellen stappen te doen om het bewuste tusschenstaat in dien zin te doen aanvullen.-

De Vice Admiraal,

Commandant der Zeemacht en Hoofd van het Departement der Marine in Nederlandsch Indië.

(w.g) W. J. G. Umbgrove.

Voor eensluidend afschrift:

De Gouvernements Secretaris,

**Annex 5**

## Decree of the Governor-General of the Netherlands East Indies, dated 27 January 1916

Source: *Official Gazette Netherlands East Indies 1916*, No. 145.

Translation provided by Malaysia:

"OFFICIAL GAZETTE OF THE NETHERLANDS EAST INDIES

1916 No. 145. TREATIES. BOUNDARIES. BORNEO. Publication in the Official Gazette of the Protocol signed in London on 28 September 1915, with accompanying map, on the demarcation of the boundary between the Netherlands territory in the island of Borneo and British North-Borneo.

Decree of the Governor-General of the Netherlands East Indies of 27 January 1916 No. 28.

Having read the official letter of the Minister of Colonies of 13 November 1915, Dpt. A3, No. 17/2279 and appendix, it appears that by Protocol, signed at London on 28 September 1915, on behalf of the mutual Governments, approval has been given to the official report, with accompanying map, of the Anglo-Dutch commission, based on Article V of the Convention mentioned below charged with the demarcation of the boundary line, as far as necessary, in the area referred to in the Convention concluded in London on 20 June 1891 between the Netherlands and the United Kingdom of Great Britain and Ireland for the determination of the boundaries between the Netherlands possessions and the states in that island which are under British protection (Official Gazette of the Netherlands East Indies 1892 No.211)

It has been approved and it is understood that:

The above shall be taken into account and that the Protocol, with the accompanying map, as referred to above, shall be made public by publishing this Decree with the annexed copies of the above-mentioned documents in the Official Gazette of the Netherlands East Indies.

Copy etc.

On the order of the Governor-General of the Netherlands East Indies
The General Secretary,

HULSHOFF POL.

Issued 15 February 1916.
The General Secretary
HULSHOFF POL"

# STAATSBLAD VAN NEDERLANDSCH-INDIË

**1916 No. 145.** **TRACTATEN. GRENZEN. BORNEO.** Plaatsing in het Staatsblad van het te Londen op 28 September 1915 onderteekend protocol met bijbehoorende kaart, inzake de uitzetting van de grens tusschen het Nederlandsch gebied op het eiland Borneo en Britsch Noord-Borneo.

**Besluit van den Gouverneur-Generaal van Nederlandsch-Indië van 27 Januari 1916 Nº 28.**

Gelezen de missive van den Minister van Koloniën van 13 November 1915, Afd. A$^{e}$. Nº 17/2279 en bijlage, waaruit blijkt dat bij protocol, onderteekend te Londen den 28$^{sten}$ September 1915, namens de wederzijdsche Regeeringen is goedgekeurd het proces-verbaal, met bijbehoorende kaart, van de Nederlandsch-Britsche commissie, ingevolge artikel V van het na te noemen tractaat aangewezen tot uitzetting op het terrein v.z.n. van de grenslijn bedoeld in de op 20 Juni 1891 te Londen tusschen Nederland en het Vereenigd Koninkrijk Groot-Brittannië en Ierland gesloten overeenkomst tot vaststelling der grenzen tusschen de Nederlandsche bezittingen op het eiland Borneo en de staten op dat eiland die onder Britsch protectoraat staan (Indisch Staatsblad 1892 Nº 211);

Is goedgevonden en verstaan:

Van het vorenstaande aanteekening te houden en te gelasten dat het protocol, met bijbehoorende kaart, hierboven bedoeld, zullen worden openbaar gemaakt door plaatsing van dit besluit met de daaraan gehechte afdrukken van voormelde stukken in het Staatsblad van Nederlandsch-Indië.

Afschrift enz.

Ter ordonnantie van den Gouverneur-Generaal
van Nederlandsch-Indië:
De Algemeene Secretaris,
HULSHOFF POL.

Uitgegeven den vijftienden Februari 1916.
De Algemeene Secretaris,
HULSHOFF POL.

## Annex 6

Certified correct translation
of the original document:

7/2/01

NOR AZMAH SHAHIDAH
Hon. Asst. Secretary
Malaysian Translators Association
c/o Dewan Bahasa & Pustaka
P. O. Box 10803
50926 Kuala Lumpur.

O.T. Haji Moham'mad Noor Bin Osman,
Pulau Danawan,
Semporna.

26 December 1962

The Hon. District Officer,
Semporna District Office.

**Appeal for Assistance**

Dear Sir,

With full respect I am glad to present this letter which please consider as words coming from our own hearts and mouths.

We hereby appeal for your consideration over the hardship we face in confronting pirates in our vicinity. We sincerely hope you would grant our appeal.

Initially we fervently request for a patrol service daily between 3.30 p.m. and 7.00 p.m. around Siamil-Danawan while considering other kinds of assistance by the administration. We have managed to gather 1120 people at a meeting held at 10.00 a.m. on the 25 December 1962 which proposed we appeal for your assistance immediately.

I, Haji Moham'mad Noor have made a survey and discovered that 90% of the villagers live in fear and are considering to move away, but I have advised them not to do so and that I would strongly appeal for assistance from the government, with high hopes that it would be granted.

The masses have given me their confidence provided they are offered the above assistance.

Respectfully I end this letter and pray for a favourable outcome.

Yours sincerely,

(O.T. MOHAM'MAD NOOR)

O.T.Haji Moham'mad Noor Bin Osman,
Pulau Danawan,
Semporna.
26th December 1962.

Yang Berhormat,
Tuan D.O. District Office,
Semporna.

MEMOHONKAN BANTUAN.

Tuan.

Dengan hormat-nya di-ma'alumkan kapada tuan. Bahua surat ini ia-lah sa-bagai ganti mulut kami berkata-kata di-hadapan tuan menentah pertimbangan di-atas ka-susahan kami fasal perompak kerana sudah ka-jadian di-siamil ini-lah permenta'an kami di-harap supaya di-benarkan.

Permenta'an kami di-waktu singkat ini sahan waktu jam pukul 3.30.petang hingga 7.00.malam petrol akan di-adakan di-siamil danawan sebelum perentah memberi bentuan yang lain dari pada ini, dan yang lain-lain. dan ini-lah ka-mettingan kami perlu di- mentah di-pertimbangkan dengan chepat-nya,kerana kami sudah metting pada 25/12/62. jam pukul 10.00.pagi yang hadzir 1120orang pada waktu metting.

Saya Haji Moham'mad Noor sudah fikir dan siasat 90% yang takut mahu berpenda, saya chakap jikalau kamu turut pada saya jangan berpenda. saya sokong mentah mentah bentuan kapada perentah supaya di-benarkan permenta'an kita oleh perentah.

Suara ra'yat terus mengaku pada pembichara'an saya asal di-adakan e-perti permenta'an kami yang tersebut di-atas.

Sakian-lah dengan hormat-nya sa-moga berhasil.

Yang Benar,
.............
O.T.Moham'mad Noor.

**SECRET**

<CREST>

OFFICE OF District Officer
Semporna

Resident Tawau

COLONY OF NORTH BORNEO

Date : 27/12/62, 19______

Ref 10/1

## Piracy at Si-Amil

I enclose a letter from O.T. Haji Md. Noor indicating that the Kg. Dinawan people all wish to leave the Island.

A precipitate move could be disastrous at this stage, both for morale and because the island is well set up with a good school, relatively good income from bearing coconuts, and near-ness to good fishing grounds. Raids would tend to increase once the pirates realised they were driving the people from their homes.

I would be grateful if you will inform me as to what extra security measures will be taken to protect this Island so that I can re-assure the O.T and the people. May I suggest something on the following lines :

1. The continual use of Si-Amil as a patrolling base for security forces. One section "off" (i.e sentry duty on Dinawan and Si-Amil), the other section on sea patrol, or one section split in this manner.

2. The training of a Si-Amil Home Guard, equipped with automatic weapons. Dinawan people should be allowed to participate in the training, but I recommend that arms be stored on Si-Amil.

3. The provision of an alarm on Dinawan to alert Si-Amil in the event of a silent raid on Dinawan. A boat for ferrying Home Guard would also be necessary; perhaps the Company could provide this.

4. Improved radio communications Si-Amil/Semporna. The present system of obtaining Si-Amil through Tawau is very unsatisfactory. A Si-Amil Bohey-Dulong link is also vital.

These measures would have the following advantages :-

1. The sea patrols would act as an extension of Bohey-Dulong. Good radio communications between Bohey-Dulong and Si-Amil and patrolling craft, would make Bohey-Dulong more effective. A point not to be overlooked is that there are good harbour facilities at Si-Amil, with ship and workshop.

2. The shore guard (security forces) could be withdrawn once the Home Guard is trained and equipped.

< Signed >
District Officer
Semporna

**SECRET**

SECRET

Resident Tawau.

OFFICE OF District Officer
Semporna.

Ref. [illegible] 10/1.

Date [illegible] 19

**Piracy at Si-Amil**

I enclose a letter from Mr. Haji [illegible] indicating that the Kg. Dinawan people all wish to leave the Island.

A precipitate move could be disastrous at this stage, both for morale and because the [illegible] good school, relatively good income from [illegible] accounts, and nearness to good fishing grounds. Raids would tend to increase once the pirates realised they were driving the people from their homes.

I would be grateful if you will inform me as to what extra security measures will be taken to protect this Island so that I can re-assure the O.T. and the people. May I suggest something on the following lines:-

1. The continual use of Si-Amil as a patrolling base for security forces. One section "off" (i.e. sentry duty on Dinawan and Si-Amil), the other section on sea patrol, or one section split in this manner.
2. The training of a Si-Amil Home Guard, equipped with automatic weapons. Dinawan people should be allowed to participate in the training, but I recommend that arms be stored on Si-Amil.
3. The provision of an alarm on Dinawan to alert Si-Amil in the event of a silent raid on Dinawan. A boat for ferrying Home Guard would also be necessary; perhaps the Company could provide this.
4. Improved radio communications Si-Amil / Semporna. The present system of obtaining Si-Amil through Tawau is very unsatisfactory. A Si-Amil / Bohey-Dulong link is also vital.

These measures would have the following advantages:-

1. The sea patrols would act as an extension of Bohey-Dulong. Good radio communications between Bohey-Dulong and Si-Amil and patrolling craft, would make Bohey-Dulong more effective. A point not to be overlooked is that there are good harbour facilities at Si-Amil, with ship and workshop.

2. The shore guard (security forces) could be withdrawn once the Home Guard is trained and equipped.

District Officer
Semporna.

SECRET

[illegible] with Mr. Saito

RESIDENT'S OFFICE
TAWAU
RECEIVED
2/1/63

BEST COPY AVAILABLE

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4

S.200.02.4 4th January 63.

[illegible]

District Officer,
Semporna.

Piracy at Si-Amil
Your [illegible] dated
[illegible] December 1962 [illegible]

Thank you for your letter; I am in full sympathy with the people of Dinawan and you may tell O.T. Haji Mohammed Noor of the following recommendations made by the Divisional Commander to the Commissioner of Police:-

Si-Amil: The fishing company will build two strong points cum block houses one on each side of the wharf. They have already been armed with 12 rifles and it is recommended that they should be issued with a further two sten guns. In addition, there are seven privately owned shotguns. The present Police post, comprising either Police or troops will remain at Si-Amil until the Home Guard is trained. Arrangements are in hand to improve radio communication.

Dinawan: It has been recommended that a section of nine Special Constables be formed armed with rifles and trained accordingly. A system of mutual protection with Si-Amil possibly by using signal pistol will be arranged. In addition I have asked the Commissioner of Police to examine further the provision of "press button" alarms. If these are obtained, I would allocate one to Dinawan.

2. A little over a week ago I had asked for a progress report on the East Coast security measures which have been approved by Government, in particular asking when sea transport would be made available. I have suggested to the Commissioner that if there is going to be delay in the construction or purchase of patrol boats to the specifications we require, then we will have to charter the most suitable local craft on a permanent basis and pay the cost.

RESIDENT, TAWAU.

E/s

c.c.: Divisional Commander, Tawau.
Files - [illegible]
[illegible]

THE
Divisional Police Headquarters,
Tawau.

FDCT/CR.(1)/63/14. 4th January, 63.

CONFIDENTIAL

RESIDENT'S OFFICE
TAWAU
RECEIVED
5/1/63
SEEN ANSWERED

The Commissioner of Police, (2)
Jesselton.

**PULAU SIAMIL - GANG ROBBERY WITH MURDER**

On 24th December, 1962 at 0020 hours a report was lodged at SEMPORNA Police Station by an employee of TAIYO INDUSTRIES on Pulau SIAMIL to the effect that the island had been robbed by armed raiders on 23rd December, 1962. This employee had arrived on a fishing vessel from the island, and the O.C.P.D., plus a police and army party, immediately proceeded to the scene with this vessel, arriving on the island at 0545 hours.

2. It was the height of misfortune, or the depths rather, that at 0800 hours on 23rd December an army patrol on a hired barter trade boat left SEMPORNA for SIAMIL, but due to engine trouble they had to turn back, and did not reach the island until 2½ hours after the pirates had left.

3. Investigations reveal that the party of armed raiders landed on the island at a point below the hospital at 1615 hours on 23rd December. They landed unobserved, and were able to infiltrate the installation area without encountering any resistance. The 3 rifles with which the camp were armed were, in spite of police advice to the contrary, under lock and key and thus not readily to hand. The pirates fired shots in the air, and all the inhabitants of the camp either ran off to the jungle or tookcover under floors etc. A clerk in the office sounded the siren before fleeing, and the wireless operator tried to raise his office in Tawau without success. Exactly what happened next is not clear, but it would appear that a 57 year-old Japanese carpenter, YUKIOKI IKEHARA, was shot as he tried to hide under the messing hut. He was killed instantly with gun-shot wounds in his left lower scapula region and in the back of his skull. A Japanese clerk, 33 year-old HUMIHIRO YAMAGAMI, ran into one of the kongsi houses past the messing hut when he slammed the door and tried to hold it from the inside. The raiders fired through the door, shooting YAMAGAMI 3 times through the back. They then entered the kongsi house, and brutally mutilated YAMAGAMI's body - he must have been killed instantly by the gunshot wounds - with their parangs. They remained in the area for about 2½ hours, plundering the offices and kongsi houses of everything of value. The loot was made up as follows :-

| | | |
|---|---|---|
| Company goods and cash | - | 11,682.00 |
| Japanese workmen's personal goods and cash | - | 6,850.40 |
| Native workmen's personal goods and cash | - | 2,369.50 |
| 21 Total: | | $ 20,901.90 |

CONFIDENTIAL

4. On their way out of the island, the raiders stopped three Bajau fishing boats who were on their way home to Pulau DINAWAN, SIAMIL's "twin". All three boats were powered with British Ansani 4 h.p. outboard engines, which were all taken by the raiders. One of the fishing boats was also taken away. The occupants of the fishing boats were able to give a fair description of the pirates and their vessel. The latter was a 20-foot kumpit-type boat, painted black and blue and powered with what looked like a 40 h.p. outboard engine. It had no super-structure nor the usual attap roofing. The raiders were around 13 in number, and spoke in the Filipino Suluk dialect (Bajau Laut). They were all described as being dressed in an olive green uniform, without insignia of any kind. After taking the outboard engines and one of the three lipa-lipa, the raiders left in the direction of the Philippines. Their speed was said to be "not fast".

5. This question of "uniformed" raiders has cropped up over and over again, and my interpretation is that it is quite probable that the soi-disant "Mayor's Political Police" (see the report on the recent liaison visit to BATU-BATU) are involved. In view of this recent upsurge of armed raids, I feel that another liaison visit to the Philippines is most necessary to try and stimulate some form of activity, and unless you order to the contrary I will make arrangements to go in the immediate future.

6. Apart from police action from SEMPORNA as detailed above, PL SABAHAN and H.M.S. BARROSA left for the area from TAWAU immediately the report was received, and the latter, with her high speed, was able to patrol into the SIBUTU/ SITANGKAI area very quickly. A number of suspicious contacts were made, but they were unfortunately able to make their escape through the coral reefs into SIBUTU Island.

7. The camp at SIAMIL is now armed with 12 rifles and 7 shotguns, strongpoints are being built and a section of Police Mobile Force is engaged in training Japanese in the use of their firearms. Chrystals to bring the camp wireless set onto the police network have been ordered from SINGAPORE.

(S. S. Bedlington)
Divisional Commander, Tawau.

c.c. The Resident, Tawau.
The O.C.P.D., Semporna. Your I.P. is returned herewith.

## Annex 7

That we, His Excellency C.V. Creagh, the Governor and highest official of the Colony of Sabak, hereby proclaim with the powers conferred on me by the officers of the British North Borneo Company, that we have bestowed the title of `chief' to our friend named Udang who lives in Semporna for his admirable assistance to the government, and in this respect we confirm that he has been honoured with this title.

Written based on the ....... Day of June in the year .......

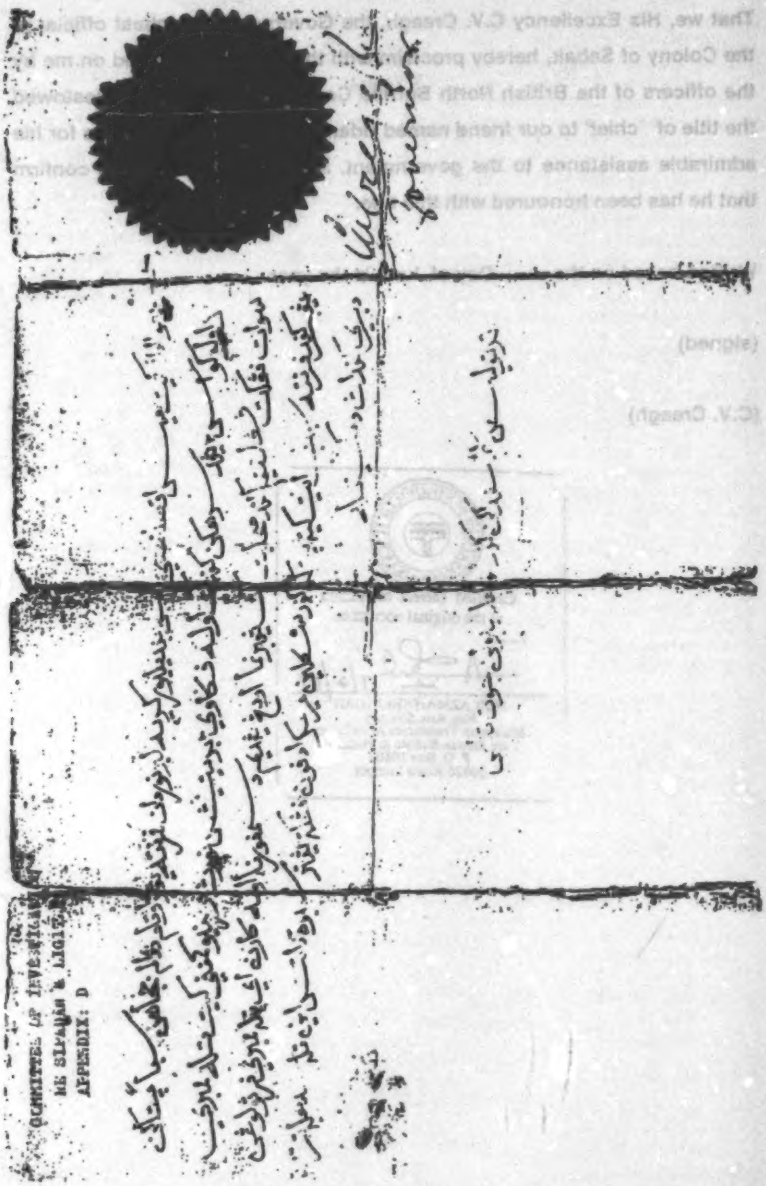
(signed)

(C.V. Creagh)

Certified correct translation
of the original document:

7/2/01

NOR AZMAH SHEHIDAN
Hon. Asst. Secretary
Malaysian Translators Association
c/o Dewan Bahasa & Pustaka
P. O. Box 10803
50926 Kuala Lumpur.



COMMITTEE OF INVESTIGATION
RE SIPADAN & LIGITAN
APPENDIX: D

# Annex 8

**DATED THIS DAY OF 1993**

**BETWEEN**

BORNEO DIVERS AND SEA SPORTS (SABAH) SDN. BHD.
PULAU SIPADAN RESORT & TOURS SDN. BHD.
and
SIPADAN DIVE CENTRE SDN. BHD.

**AND**

ALUKAN BIN KANEH
and
MUNTING BIN PG ABU SARI

---

## SALE & PURCHASE AGREEMENT

---

MESSRS LEE & THONG
ADVOCATES & SOLICITORS
COMMISSIONERS FOR OATHS
NOTARY PUBLIC
76, JALAN GAYA (2ND FLOOR)
88000 KOTA KINABALU SABAH MALAYSIA

P. O. BOX NO. 11037
88811 KOTA KINABALU SABAH MALAYSIA

TELEPHONE NOS.: 53238 & 225127
FAX : 233634

SPLHF/SALEPUR1.EGG/e.

# SALE AND PURCHASE AGREEMENT

BETWEEN **BORNEO DIVERS AND SEA SPORTS (SABAH) SDN. BHD.** of Rooms 401-409, 4th Floor, Wisma Sabah, Kota Kinabalu, Sabah, **PULAU SIPADAN RESORT & TOURS SDN. BHD.** of 1st Floor, No. 484, Bandar Sabindo, Peti Surat 61120, 91021 Tawau, Sabah And **SIPADAN DIVE CENTRE SDN. BHD.** of A1026, 10th Floor, Wisma Merdeka, Jalan Razak, 88000 Kota Kinabalu, Sabah Malaysia (hereinafter collectively referred to as the 'Purchasers') of one part

AND

**ALUKAN BIN [illegible]ANEH** and **HUNTING BIN PG ABU SARI** both of Semporna, Sabah, Malaysia (hereinafter referred to as the 'Vendors' which expression shall where the context so admits include their successors in title and assigns) of the other part.

WHEREAS the Purchasers are companies incorporated in Malaysia and having their business as dive and resort operators on Pulau Sipadan.

WHEREAS the Vendors are the acknowledged traditional turtle egg collectors and having possessed the right to collect turtle eggs on Pulau Sipadan and the right to dispose and sell the same.

AND WHEREAS the Purchasers are desirous of purchasing all the turtle eggs laid on Pulau Sipadan and the Vendors are desirous of selling the same to the Purchasers upon the terms and conditions hereinafter appearing.

NOW THIS AGREEMENT WITNESSETH as follows :-

1. In consideration of a yearly sum of Ringgit Malaysia Fifty Thousand (RM50,000.00) only, the Vendors shall sell and the Purchasers shall purchase all the turtle eggs laid on Pulau Sipadan.

2. Upon signing of this Agreement the Purchasers shall pay to the Vendors the sum of Ringgit Malaysia Fifty Thousand (RM50,000.00) only, the receipt whereof the Vendors hereby acknowledge.

BEST COPY AVAILABLE

3. This Agreement shall remain in force for 4 years from the date hereof and shall not be terminated by the Vendors save where the Purchasers fail to pay the said Ringgit Malaysia Fifty Thousand (RM50,000.00) on the due date and upon expiry of a written notice of demand of not less than 21 days.

4. The next payment and subsequent payments of the said Ringgit Malaysia Fifty Thousand (RM50,000.00) shall be paid on or before the expiry of 12 calendar months from the date hereof.

5. Upon the signing of this Agreement the Vendors shall cease immediately all collection of turtle eggs on Pulau Sipadan. All eggs already collected shall be removed immediately out of Pulau Sipadan.

6. During the currency of this Agreement the Vendors, their families, employees or servants and assigns shall not collect, remove, dispose or in any manner disturb any nest or eggs laid on Pulau Sipadan.

7. The Purchasers and Vendors both covenant that they shall endeavour to ensure that all turtle eggs laid shall remain in situ for the natural hatching and there shall be no removal of the same save in accordance with instructions from the Department of Wildlife.

8. The Purchasers and Vendors shall assist the Department of Wildlife to ensure the turtle eggs nest are not disturbed.

9. In the event of a dispute arising out of this Agreement, it shall be referred to the Director of Wildlife Department for arbitration whose decision on the matter shall be final.

BEST COPY AVAILABLE

IN WITNESS WHEREOF the Parties have hereunto set their hands and seals the day and year first above written.

Signed by for and on behalf )
of the said BORNEO DIVERS AND )
SEA SPORTS (SABAH) SDN. BHD. )
in the presence of )

..........................    ..........................

Signed for and on behalf )
of the said PULAU SIPADAN )
RESORT & TOURS SDN. BHD. )
in the presence of :- )

..........................    ..........................

Signed for and on behalf )
of the said SIPADAN DIVE )
CENTRE SDN. BHD. )
in the presence of )

..........................    ..........................

SIGNED by the said )
ABDUL RAUF BIN MAHAJUD )
(NRIC. NO. H0434507) )
for and on behalf of )
ALUKAN BIN KANEH )
in the presence of :- )

.......................

ABDUL RAUF BIN MAHAJUD
(NRIC. NO. H0434507)
PA - Mahkamah Anak Negeri
Semporna Ref. No. 12/93

.......................

SIGNED by the said )
MUNTING BIN PG ABU BARI )
in the presence of :- )

.......................

.......................

# APPLICATION FOR PERMISSION TO INTERVENE BY THE PHILIPPINES

# REQUÊTE À FIN D'INTERVENTION DES PHILIPPINES

INTERNATIONAL COURT OF JUSTICE

# APPLICATION FOR PERMISSION TO INTERVENE

## BY THE GOVERNMENT OF THE PHILIPPINES

filed in the Registry of the Court
on 13 March 2001

## CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

(INDONESIA/MALAYSIA)

---

COUR INTERNATIONALE DE JUSTICE

# REQUÊTE À FIN D'INTERVENTION

## DU GOUVERNEMENT DES PHILIPPINES

enregistrée au Greffe de la Cour
le 13 mars 2001

## AFFAIRE RELATIVE À LA SOUVERAINETÉ SUR PULAU LIGITAN ET PULAU SIPADAN

(INDONÉSIE/MALAISIE)

2000
eneral List
No. 102

# APPLICATION FOR PERMISSION TO INTERVENE

To the Registrar of the International Court of Justice,
The Hague.

1. On behalf of the Government of the Republic of the Philippines I have the honour

*(a)* to invoke Article 62 of the Statute of the International Court of Justice and, in accordance with the terms thereof, to request from the Honourable Court permission to intervene in the current proceedings involving the Government of the Republic of Indonesia and the Government of Malaysia concerning sovereignty over Pulau Ligitan and Pulau Sipadan; and

*(b)* to state that the Government of the Republic of the Philippines hereby appoints as its Agent H.E. Ambassador Eloy R. Bello III, and that his address for service shall be Laan Copes van Cattenburch 125, 2585 EZ The Hague.

## I. PRELIMINARY STATEMENTS

2. To assist the Court in its evaluation of the merits of this submission, the Philippine Government would like to preface this Application with the following statement:

*(a)* In a communication addressed to the Court dated 22 February 2001, the Government of the Republic of the Philippines requested the Court, pursuant to Article 53, paragraph 1, of the Rules of Court, to be furnished copies of the pleadings and documents annexed pertaining to the current proceedings between Indonesia and Malaysia. An urgent reiteration of this request was made in another communication to the Court dated 9 March 2001. The Government of the Republic of the Philippines wishes to inform the Honourable Court that the Philippines considers the request for copies of the pleadings and documents annexed as an act separate and distinct from the present Application. The present Application for permission to intervene does not affect, and is independent from, the earlier submissions made by the Philippine Government. However, it may be pointed out that a positive resolution of the request under Article 53, paragraph 1, of the Rules of Court will serve to facilitate the proceedings sought to be initiated by the present Application.

*(b)* By this Application, the Government of the Republic of the Philippines would like to state that it does not intend to change the subject-matter, the nature or the scope of the current proceedings between Indonesia and Malaysia. Nor does the Philippine Government seek to ask the Court to adjudicate additional or extraneous legal issues. The Government of the Republic of the Philippines only wishes to present and demonstrate its legal rights and interests to the Court and, as appropriate, to state its

views as to how the determination of sovereignty over Pulau Ligitan and Pulau Sipadan may or may not affect those legal rights and interests.

## II. INTEREST OF A LEGAL NATURE

3. In accordance with the provisions of Article 81 of the Rules of Court, the Government of the Republic of the Philippines will now indicate the interest of a legal nature which may be affected by a decision in the case concerning sovereignty over Pulau Ligitan and Pulau Sipadan.

4. The Government of the Republic of the Philippines considers that it does have an interest of a legal nature which primarily concerns, but is not confined to, the following:

*(a)* Under Article 2 of the Special Agreement between the Government of the Republic of Indonesia and the Government of Malaysia, the Court has been requested to determine the issue of sovereignty over Pulau Ligitan and Pulau Sipadan "on the basis of treaties, agreements and any other evidence" to be furnished by the Parties. The interest of the Republic of the Philippines is solely and exclusively addressed to the treaties, agreements and other evidence furnished by Parties and appreciated by the Court which have a direct or indirect bearing on the matter of the legal status of North Borneo. The legal status of North Borneo is a matter that the Government of the Republic of the Philippines considers as its legitimate concern.

*(b)* The Constitution of the Republic of the Philippines, as well as its legislation, have laid claim to dominion and sovereignty over North Borneo. This legal and historical claim to the territory of North Borneo has been the subject of diplomatic negotiations, official international correspondence, and peaceful discussions which have not been concluded. A decision by the Court, or that incidental part of a decision by the Court, which lays down an appreciation of specific treaties, agreements and other evidence bearing on the legal status of North Borneo will inevitably and most assuredly affect the outstanding territorial claim of the Republic of the Philippines to North Borneo, as well as the direct legal right and interest of the Philippines to settle that claim by peaceful means.

## III. THE OBJECT OF THE INTERVENTION REQUESTED

5. The intervention for which permission is requested has the following objects:

*(a)* First, to preserve and safeguard the historical and legal rights of the Government of the Republic of the Philippines arising from its claim to dominion and sovereignty over the territory of North Borneo, to the extent that these rights are affected, or may be affected, by a determination of the Court of the question of sovereignty over Pulau Ligitan and Pulau Sipadan.

*(b)* Second, to intervene in the proceedings in order to inform the Honourable Court of the nature and extent of the historical and legal rights of the Republic of the Philippines which may be affected by the Court's decision.

(c) Third, to appreciate more fully the indispensable role of the Honourable Court in comprehensive conflict prevention and not merely for the resolution of legal disputes.

## IV. BASIS OF JURISDICTION

6. The Government of the Republic of the Philippines does not seek to become a party to the dispute before the Court concerning sovereignty over Pulau Ligitan and Pulau Sipadan.

7. Consequently, and considering that this Application is merely an incidental proceeding, the Government of the Republic of the Philippines asserts that this Application for permission to intervene is based solely on Article 62 of the Statute, which does not require a separate title of jurisdiction as a requirement for this Application to prosper.

## V. CONCLUSION

8. For the reasons set forth above, the Government of the Republic of the Philippines requests the Honourable Court to recognize the propriety and validity of this Application for permission to intervene in the proceedings between the Government of the Republic of Indonesia and the Government of Malaysia, to grant the same, and to participate in those proceedings in accordance with Article 85 of the Rules of Court.

9. The Government of the Republic of the Philippines reserves the right to present supplementary arguments and observations as and when the procedure of the Court offers the occasion to do so. For this purpose, the Philippines is willing to abide by whatever time-limits fixed by the Court to ensure the just and speedy disposition of the case to which this Application refers.

13 March 2001.

*(Signed)* Eloy R. BELLO III,
Agent.

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN
(INDONESIA/MALAYSIA)

# WRITTEN OBSERVATIONS OF INDONESIA

# OBSERVATIONS ÉCRITES DE L'INDONÉSIE

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

ON

THE PHILIPPINES' APPLICATION FOR PERMISSION TO INTERVENE

2 MAY 2001

# CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

# (INDONESIA/MALAYSIA)

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# OBSERVATIONS

# OF

# THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

# ON

# THE PHILIPPINES' APPLICATION FOR PERMISSION TO INTERVENE

**2 MAY 2001**

## OBSERVATIONS OF THE REPUBLIC OF INDONESIA ON THE PHILIPPINES' APPLICATION FOR PERMISSION TO INTERVENE

1. These Observations are filed pursuant to the Registrar's letter dated 14 March 2001 informing the Parties that the Court had fixed 2 May 2001 as the time-limit for the filing of written observations on the Application for permission to intervene submitted by the Philippines. For the reasons set out below, the Republic of Indonesia considers that the Application should not be granted.

### A. The Philippines' Application Should Be Rejected as Untimely

2. Article 81, paragraph 1, of the Rules of Court provides that an application for permission to intervene –

> "... shall be filed as soon as possible, and not later than the closure of the written proceedings. In exceptional circumstances, an application submitted at a later stage may however be admitted".

3. In the present case, the Special Agreement between Indonesia and Malaysia was signed on 31 May 1997. Instruments of ratification were exchanged on 14 May 1998, the Special Agreement was registered with the United Nations on 29 May 1998 and the Special Agreement was notified to the Court on 2 November 1998. Since that date, the Parties have filed three rounds of written submissions, the Replies of the Parties having been filed on 2 March 2001. Both Parties agree that there is no need for a further round of written pleadings in the case and that the case is ripe for oral hearings.

4. Despite the fact that the Court has been seized of the case since 2 November 1998 – a fact which the Philippines must have been aware of given that copies of the Special Agreement are circulated to all Members of the United Nations (Article 40 of the Statute; Article 42 of the Rules of Court) – the Philippines waited until 13 March 2001 to submit its Application for permission to intervene. In these circumstances, it is clear that the Philippine Application has not been filed "as soon as possible" as stipulated in Article 81(1) of the Rules of Court.

5. In addition, the last written pleadings mandatorily provided for in the Special Agreement were the Parties' Replies. These were duly filed on 2 March 2001, before the Philippines' Application was received by the Court. In view of the fact that the Parties do not consider that there is any need for further written submissions on the merits of the case and that the Philippines' Application was filed after the final written submissions of the Parties, the Application should be dismissed as untimely pursuant to Article 81(1) of the Rules of Court.

6. It is true that Article 81(1) of the Rules of Court provides that "in exceptional circumstances" an application submitted at a later stage may be admitted. However, the Philippines has failed to demonstrate that any such exceptional circumstances exist justifying the filing of its Application at such a late stage of the proceedings. As noted above, the Philippines has known that the Court was seized of the present dispute between Indonesia and Malaysia from at least 2 November 1998. There is no reason why the Philippines, had it genuinely considered that it had an interest of a legal nature that could be affected by a decision in the case, could not have filed its Application earlier and certainly before the Parties had already submitted three rounds of written pleadings in the case.

7. The Parties to the case have indicated that, in their view, the case is ripe for oral hearings on the merits. In a case brought by Special Agreement, such as the present one, these views should be entitled to considerable weight and the Parties should be entitled to expect that the resolution of their dispute will proceed in an efficient and orderly manner. To admit the Application at this stage of the proceedings would inevitably entail a significant delay in the case being heard by the Court to the prejudice of the Parties. In these circumstances, Indonesia submits that the Philippines' Application should be dismissed as untimely.

### B. The Philippines Has Not Demonstrated that It Possesses an Interest of a Legal Nature Which May Be Affected by a Decision in the Case

**8. Article 62 of the Court's Statute provides as follows:**

> **" 1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.**
>
> **2. It shall be for the Court to decide upon this request".**

**Article 81(2) of the Rules of Court further provides that an application for permission to intervene shall set out:**

> **"(a) the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case;**
> **(b) the precise object of the intervention;**
> **(c) any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case".**

**9. It is significant that the rules governing intervention fall within Section D of the Rules of Court dealing with "Incidental Proceedings", and the Court itself has underscored the fact that "every intervention is incidental to the proceedings in a case" in both the *El Salvador/Honduras* and *Haya de la Torre* cases[1]. As the Court went on to observe in its Judgment in the *Haya de la Torre* case:**

> **" it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings"[2].**

**10. The subject-matter of a dispute brought by special agreement is necessarily defined by the special agreement itself. As the Court noted in its Judgment on Italy's Application to intervene in the *Libya-Malta* continental shelf case:**

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[1] ***Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Order of 28 February 1990, I.C.J. Reports 1990, p. 4, citing Haya de la Torre, Judgment, I.C.J. Reports 1951, p. 76.***

[2] ***Haya de la Torre, Judgment, I.C.J. Reports 1951, p. 76.***

> "In a case brought before the Court by special agreement, the scope of the Court's action is defined by that agreement, which embodies the consent of the parties to the settlement by the Court of the dispute between them"[3].

11. In the present case, the scope of the dispute before the Court is set out in the Special Agreement between Indonesia and Malaysia notified to the Court on 2 November 1998. The Preamble to the Special Agreement and Article 2 thereof provide as follows:

> "Considering that a dispute has arisen between them [Indonesia and Malaysia] regarding sovereignty over Pulau Ligitan and Pulau Sipadan; ...
>
> Article 2
> Subject of the Litigation
>
> The Court is requested to determine on the basis of the treaties, agreements, and any other evidence furnished by the Parties, whether sovereignty over Pulau Ligitan and Pulau Sipadan belongs to the Republic of Indonesia or to Malaysia".

12. These provisions make it clear that the subject-matter of the dispute currently pending before the Court is limited to the question whether sovereignty over the islands of Ligitan and Sipadan belongs to Indonesia or Malaysia. In its Application for permission to intervene, the Philippines expressly states that it is not its intention to change the scope of the dispute submitted by Indonesia and Malaysia to the Court. In the words of the Philippines' Application:

> "By this Application, the Government of the Republic of the Philippines would like to state that it does not intend to change the subject matter, the nature or the scope of the current proceedings between Indonesia and Malaysia"[4].

13. On 5 April 2001, the Embassy of the Republic of the Philippines in Jakarta sent a diplomatic Note to the Department of Foreign Affairs of Indonesia in which the

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[3] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 24, para. 38.

[4] Philippines' Application, para. 2(b).

Philippines Government, referring to the ongoing case between Indonesia and Malaysia, stated that –

> "... the Government of the Republic of the Philippines wishes to reassure the Government of the Republic of Indonesia that it does not have any territorial interest on Sipadan and Ligitan islands"[5].

14. It is evident from this letter that the Philippines raises no claim with respect to Pulau Ligitan and Pulau Sipadan. It therefore follows that the Philippines has expressly disavowed any interest of a legal nature in the actual subject-matter of the dispute currently pending between Indonesia and Malaysia. In its Application, the Philippines asserts instead that its interest "is solely and exclusively addressed to the treaties, agreements and other evidence furnished by the Parties and appreciated by the Court which have a direct or indirect bearing on the matter of the legal status of North Borneo"[6].

15. The legal status of North Borneo is not a matter on which the Court has been asked to rule. Moreover, the desire of the Philippines to submit its view on various unspecified "treaties, agreements and other evidence furnished by the Parties" is abstract and vague. In these circumstances, the Philippines has failed to demonstrate that it has an interest of a legal nature which may be affected by a decision in the case in accordance with Article 62 of the Statute.

16. Finally, it should be noted that Article 81(3) of the Rules of Court contains the additional requirement that, "The application shall contain a list of documents in support, which documents shall be attached". In so far as it is claimed that the Philippines' request is directed to safeguarding its historical and legal rights over the territory of North Borneo, such an alleged interest is unsupported by any documentary or other evidence contrary to the requirements of Article 81(3) of the Rules of Court.

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[5] A copy of this Note is attached as Annex 1 to these Observations. The Note also reiterates the point raised in the Application that the Philippines does not seek to become a party to the case.

[6] Philippines' Application, para. 4(a).

### C. Conclusion

17. Under Article 62(2) of the Statute of the Court, the Court has discretion to decide whether or not to admit an application for permission to intervene. For the reasons set forth above, the Republic of Indonesia considers that the Philippines' Application is untimely and unconnected with the actual subject-matter of the dispute, which is the question of sovereignty over Ligitan and Sipadan as between Indonesia and Malaysia. Moreover, the object of the Application is abstract and vague. As such, Indonesia submits that the Philippines has not demonstrated that it has an interest of a legal nature which may be affected by a decision in the case and that the Application should, accordingly, be denied.

Abdul Irsan
Co-Agent for the Republic of Indonesia

# ANNEX 1

No. 147-01

The Embassy of the Republic of the Philippines presents its compliments to the Department of Foreign Affairs of the Republic of Indonesia and further to its Note no. 110.01 of 08 March 2001 on the ongoing case between Indonesia and Malaysia in the International Court of Justice over Pulau Sipadan and Pulau Ligitan has the honor to inform the latter that the Government of the Republic of the Philippines wishes to reassure the Government of the Republic of Indonesia that it does not have any territorial interest on Sipadan and Ligitan islands.

The Philippine Government's motion to file for a petition to intervene proceeds from the desire and obligation to safeguard its national interest, which may be affected by the proceedings and outcome of the case. Furthermore, the decision to intervene should not be interpreted as a sign that the Philippine Government wants to be a party to the case. The Embassy appeals to the Indonesian Government's support and understanding on this matter.

The Embassy of the Republic of the Philippines avails itself of this opportunity to renew to the Department of Foreign Affairs of the Republic of Indonesia the assurances of its highest consideration.

Jakarta, 05 April 2001

# WRITTEN OBSERVATIONS
# OF MALAYSIA

# OBSERVATIONS ÉCRITES
# DE LA MALAISIE

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING SOVEREIGNTY OVER
PULAU LIGITAN AND PULAU SIPADAN

INDONESIA/MALAYSIA

OBSERVATIONS OF MALAYSIA
ON THE APPLICATION FOR PERMISSION
TO INTERVENE BY THE GOVERNMENT OF
THE REPUBLIC OF THE PHILIPPINES

2 MAY 2001

## INTERNATIONAL COURT OF JUSTICE

# CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

## INDONESIA/MALAYSIA

## OBSERVATIONS OF MALAYSIA ON THE APPLICATION FOR PERMISSION TO INTERVENE BY THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES

2 MAY 2001

# CASE CONCERNING SOVEREIGNTY
# OVER PULAU LIGITAN AND PULAU SIPADAN
# (INDONESIA/MALAYSIA)

## Written Observations of Malaysia on the Application for permission to intervene by the Government of the Republic of the Philippines

### Introduction

1. These written observations are made by Malaysia in response to the Registrar's letter of 14 March 2001.

2. To summarize, Malaysia categorically rejects any attempt of the Philippines to concern itself with a territorial dispute involving two small islands off the coast of Sabah (formerly North Borneo). The subject of the dispute between Indonesia and Malaysia is not Malaysia's sovereignty over the State of Sabah (which sovereignty Indonesia explicitly accepts and recognises). It is solely the question of title to two small islands off Semporna, Malaysia. Indonesia's claim is based on an interpretation of Article IV of the Convention of 1891 between Great Britain and the Netherlands. Spain had previously expressly recognised British title over the territory which was the subject of the 1891 Convention, by Article III of the Protocol of 1885.[1] The Philippines can have no greater rights than Spain had. The interpretation of the 1891 Convention is thus a matter exclusively between Indonesia and Malaysia, in which the Philippines can have no legal interest. Nor does the Philippines have any legal interest in the subject matter of the specific dispute submitted to the Court by the Special Agreement. The Application completely fails to specify how the Philippines could be affected by the outcome of the case. But even if the Philippines did have a tangential and derivative interest in Malaysia's winning the case against Indonesia (in the

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[1] Malaysian Memorial, vol. 2 Annex 15.

sense that this would confirm the territorial extent of the State of Sabah, which State the Philippines claims), such an interest is in no way specific enough to justify the intervention. Malaysia has no need of the Philippines' intervention; Indonesia can gain nothing from it. For the Court to grant the request could appear to give substance to a baseless claim to a much larger territory which is not in dispute between Malaysia and Indonesia. This is wholly outside the purpose of article 62.

3. In these written observations, Malaysia first places in due perspective the "claim" of the Philippines to Sabah, which is the subject of the Philippines application (Section A). It then demonstrates that the Philippines has no interest of a legal nature in the dispute submitted to the Court by Malaysia and Indonesia (Section B). It shows that there is no specified or legitimate object to the Philippines' request (Section C). It submits that, in any event, the Court should refuse that request in the exercise of the power of appreciation given it by article 62 (Section D). There follow some brief concluding remarks.

## A. The Philippines' claim to Sabah

4. In order to deal with the Philippines' Application, it is not necessary for the Court to pronounce upon its claim to Sabah. However, for the Court to appreciate the issues at stake an outline of the claim may be helpful — the more so since even a brief examination is sufficient to show that the claim is manifestly untenable.[2]

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[2] In its application, the Philippines has not bothered to explain to the Court the "legal basis" of its claim to Sabah. That claim was first introduced by Philippines' representatives in the General Assembly in 1962. See *General Assembly Official Records*, 1177th mtg., 27 November 1962, pp. 874-877 (attached as Annex 1 to these Observations); *ibid.*, 4th Committee, 1420th mtg., 12 December 1962, pp. 621-622 (attached as Annex 2). The claim was subsequently published as *Philippine Claim to North Borneo*, *Volume I*, Manila, Bureau of Printing, 1963, 159 pages. Copies of this publication have been lodged with the Court.

5. The Malaysian State of Sabah has a population of 2.6 million and a land area of 73,610 square km. This represents 11% of the population of Malaysia and about 22% of its total area. As a component State of the federation, Sabah has its own legislature, government and public administration. Elections to the State legislature are held every 4-5 years. Altogether 9 elections have been held since 1963. The latest was in March 1999.

6. What is now the State of Sabah has been under the effective control of Malaysia and its predecessors in title since the late-nineteenth century. During this period, it has never been under the control of the Philippines or its predecessors in title. Sabah includes 202 islands, only two of which (Sipadan and Ligitan) are the subject of the present dispute with Indonesia, as specified in the Special Agreement for Submission to the International Court of Justice of the Dispute between Indonesia and Malaysia concerning Sovereignty over Pulau Ligitan and Pulau Sipadan dated 31 May 1997.

7. Unlike Indonesia's claim in the present case, the Philippines' claim extends to the whole of the territory of Sabah. It is presented by the Philippines irrespective of the wishes of the people of Sabah. It is not a claim to two small islands.

8. The Philippines' claim to Sabah was first raised in 1962. It was never presented in any form to the British North Borneo Company. Nor had it been previously presented to Britain. From 1946, Great Britain reported on North Borneo to the Committee established under article 73 (e) of the Charter of the United Nations. During this period the Philippines, as a leader of the decolonization movement and a regular member of the Committee, never once raised any claim to the territory.[3] On the contrary it expressly recognised

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[3] This is despite the fact that a number of claims were made, and annually recorded, by various States to various territories: see e.g. *United Nations Yearbook, 1948-49*, p. 730 and in each successive year until 1961.

British authority over North Borneo in a number of treaties.[4] It was only after the people of North Borneo agreed in 1961 to consider joining Malaysia that the Philippines' claim was announced. The claim was and is based on an alleged "cession" of sovereignty over North Borneo in 1962. The "cession" was signed as a private law document by a group of persons claiming to be private law heirs of the last Sultan of Sulu, Sultan Jamal Al Alam, who died in 1936. As an international legal act it was and is worthless.

9. In fact and in law, the Philippines' claim to Sabah is totally lacking in foundation, *inter alia* for the following reasons.

(a) As an international entity, the Sultanate of Sulu disappeared in September 1878, when Spain at last succeeded in conquering the sultanate.[5]

(b) Great Britain recognised Spanish sovereignty over the Sulu Archipelago in 1885. At the same time, Spain expressly renounced...

> "as far as regards the British Government, all claims of sovereignty over the territories of the continent of Borneo, which belong, or which have belonged in the past to the Sultan of Sulu (Jolo), and which comprise the neighbouring islands of Balambangan, Banguey, and Malawali, as well as all those comprised within a zone of three maritime leagues from the coast, and which form part of the territories administered by the company styled the 'British North Borneo Company'."[6]

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[4] See e.g. Philippines-United Kingdom, Agreement for Air Services between and beyond their Respective Territories, Manila, 7 January 1948: *United Nations Treaty Series*, vol. 29, p. 63; Philippines-United Kingdom, Agreement for Air Services between and beyond their Respective Territories, Manila, 31 January 1955: *United Nations Treaty Series*, vol. 216 p. 51; Philippines-United Kingdom (on behalf of North Borneo), Agreement concerning migration of Filipino labor for employment in British North Borneo, Manila, 29 August 1955: *United Nations Treaty Series*, vol. 221 p. 241.

[5] Malaysian Memorial, vol. 2 Annex 12. The Sultan subsequently confirmed his subjection to the United States in an agreement of 20 August 1899: Malaysian Memorial, vol. 2 Annex 20.

[6] Malaysian Memorial, vol. 2 Annex 15.

Under the law in force at the time, this was a perfectly lawful and valid renunciation. It extinguished any purported claim of sovereignty over British North Borneo by Spain or by Sulu. Any attempt to revive that claim now is wholly precluded.

(c) The validity of this transaction was expressly recognised by the United States, in its capacity as sovereign over the Philippines and as successor to Spain. Indeed it did so twice, in the Exchange of Notes of 1907[7] and then in the 1930 Boundary Convention.[8]

(d) After 1878, neither the Sultan of Sulu nor his heirs had any capacity to hold or cede sovereignty or sovereign rights. The British Government expressly recognised this in the negotiations leading to the 1907 Exchange of Notes.[9] In fact the Sultanate as an entity within the Philippines was abolished on the death of the last Sultan in 1936.[10]

10. The Philippines' claim is to the whole territory of the State of Sabah. Evidently, this claim cannot be reconciled with the treaties of 1885, 1907 and 1930. It is also completely inconsistent with the principle of self-determination. British North Borneo was a non-self-governing territory under Chapter XI of the United Nations Charter. In 1963, the people of North Borneo exercised their right of self-determination, as was affirmed by the Secretary-General of the United Nations. Pursuant to an agreement between the Federation of Malaya, Indonesia and the Philippines,[11] and with the consent of the United Kingdom, the Secretary-General conducted a consultation in North Borneo and Sarawak in August-September 1963. Based on the Report of his Mission, the Secretary-General concluded as follows:

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[7] Malaysian Memorial, vol. 2 Annexes 23-24.

[8] Malaysian Memorial, vol. 2 Annex 29.

[9] See Malaysian Memorial, vol. 1, para. 5.35; Malaysian Reply, para. 2.4, third dot point.

[10] See Malaysian Memorial, , vol. 1, para. 5.23.

[11] Manila Accord, 31 July 1963, *United Nations Treaty Series*, vol. 550 p. 343; Joint Statement, Manila, 5 August 1963, *ibid.*, p. 356. The Secretary-General's mandate was specified in para. 4 of the Joint Statement.

> "The Secretary-General referred to the fundamental agreement of the three participating Governments and the statement by the Republic of Indonesia and the Republic of the Philippines that they would welcome the formation of the Federation of Malaysia provided that the support of the people of the territories was ascertained by him, and that, in his opinion, complete compliance with the principle of self-determination within the requirements of General Assembly resolution 1541(XV), Principle IX of the Annex, had been ensured. He had reached the conclusion, based on the findings of the Mission that on both of these counts there was no doubt about the wishes of a sizeable majority of the people of those territories to join in the Federation of Malaysia."[12]

The text of the Secretary-General's Report is attached as Annex 3.

11. Even after the choice of the people of the territory was confirmed by the Secretary-General in 1963, the Philippines continued sporadically to raise its claim to Sabah. It has however produced no arguable basis of claim. Discussions with Malaysia have focussed exclusively on ways in which the Philippines might withdraw its claim without offending its own domestic public opinion. It was in this sense that the Malaysian Prime Minister described the claim as a "domestic problem" for the Philippines. There have been no negotiations between Malaysia and the Philippines even on that limited subject since 1987. The Philippines refers to "diplomatic negotiations, official international correspondence, and peaceful discussions that have not been concluded" (Philippines' Application, para. 4 (b)). There are no such negotiations pending, no unanswered correspondence and no continuing discussions of any kind on the claim.

12. It should be stressed that the Philippines has never made a claim to *parts* of Sabah: its claim is to the territory of the State as a whole. Its claim to

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[12] Report of the Secretary-General, 14 September 1963, as set out in *United Nations Yearbook*, 1963, p. 43. See also Annual Report of the Secretary-General on the Work of the Organization, 16 June 1963—15 June 1964, *General Assembly Official Records*, 19th session, Supp. No. 1 (A/5801), pp. 26-28.

Sabah derives from the Sulu grant of 1878. In its view, that grant was only a temporary lease,[13] and a right of reversion has survived (a) the extinction of the Sultanate as an international person; (b) the express recognition of British rights over North Borneo by Spain in 1885; (c) the express recognition of British sovereignty by the United States in 1930; (d) the complete suppression of the Sultanate by the United States in 1936; (e) the subsequent recognition of British rights to North Borneo by the Philippines after it became independent.

13. Even if (*quod non*) these obstacles could be overcome, the two islands which are the subject of the present dispute were *not* covered by the grant of 1878. Someone claiming a right of reversion to territory covered by that grant would not be entitled to the two islands.[14] Even in its own terms, the Philippines' claim to Sabah gives it no right to the islands.

## B. The Republic of the Philippines has no interest of a legal nature in the case before the Court

14. Article 62 requires a State which seeks to intervene to establish "an interest of a legal nature which may be affected by the decision in the case". As the Court has made clear in previous cases...

> "...In order to obtain permission to intervene under Article 62 of the Statute, a State has to show an interest of a legal nature which may be affected by the Court's decision in the case or that *un intérêt d'ordre juridique est pour lui en cause* – the criterion stated in Article 62."[15]

15. The burden of proof of the existence of an interest of a legal nature lies with the State seeking to intervene. In the *Land, Island and Maritime Frontier*

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[13] In fact the grant (Malaysian Memorial, vol. 2 Annex 9) is expressed to be "for ever" and there is no right of reversion. See also Malaysian Memorial, vol. 2 Annex 10.

[14] Malaysia and Indonesia agree that the two islands were not covered by the 1878 grant. See Malaysian Memorial, vol. 1, p. 39; Indonesian Memorial, vol. 1, p. 14.

[15] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, ICJ Reports 1990*, p. 114, para. 52.

*Dispute (El Salvador/Honduras), Application to Intervene* case, the Chamber of the Court noted:

> "..it is clear, first, that it is for a State seeking to intervene to demonstrate convincingly what it asserts, and thus to bear the burden of the proof; and, second, that is has only to show that its interest 'may' be affected, not that it will or must be affected. What needs to be shown by a State seeking permission to intervene can only be judged *in concreto* and in relation to all the circumstances of a particular case. It is for the State seeking to intervene to identify the interest of a legal nature which it considers may be affected by the decision in the case, and to show in what way that interest may be affected; it is not for the Court itself – or in the present case the Chamber – to substitute itself for the State in that respect."[16]

16. The Special Agreement of 31 May 1997 and the submissions of the Parties in the present case define the scope of the dispute before the Court and the decision called for. As the Court remarked in *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene:*

> "Normally, the scope of a decision of the Court is defined by the claims or the submissions of the parties before it: and in the case of an intervention it is thus by reference to the definition of its interest of a legal nature and the object indicated by the State seeking to intervene that the Court should judge whether or not the intervention is admissible."[17]

17. The admissibility of the intervention as regards the existence of a legal interest thus depends on a comparison of on the one hand, the scope of the decision sought by the parties under the Special Agreement and their submissions, and on the other hand, the interest alleged by the third party.

18. The Special Agreement between Indonesia and Malaysia of 31 May 1997, Article 2, specifies the "Subject of the Litigation" in the following terms:

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[16] *Ibid.*, pp. 117-118, para. 61.

[17] *Continental Shelf (Libyan Arab Jamahiriya/Malta) Application for Permission to Intervene, ICJ Reports 1984*, p. 19, para. 29.

> "The Court is requested to determine on the basis of the treaties, agreements and any other evidence furnished by the Parties, whether sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia or to the Republic of Indonesia."[18]

19. The submissions of the Republic of Indonesia, concluding its Memorial, state:

> "On the basis of the considerations set out in this Memorial, the Republic of Indonesia requests the Court to adjudge and declare that:
>
> (a) sovereignty over Pulau Ligitan belongs to the Republic of Indonesia; and
>
> (b) sovereignty over Pulau Sipadan belongs to the Republic of Indonesia."[19]

20. The submissions of Malaysia, concluding its Memorial, state:

> "In the light of the considerations set out above, Malaysia respectfully requests the Court to adjudge and declare that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia."[20]

21. Against this background it is necessary to consider what interest of a legal nature is alleged by the Philippines.

22. The first point to note is that the Philippines Application is extremely vague and indecisive in this respect. As the Chamber in the *Land, Island and Maritime Frontier Dispute case (El Salvador/Honduras), Application to Intervene* stressed, "there needs finally to be clear identification of any legal interests that may be affected."[21] But the Philippines is anything but clear. In paragraph 2 (b) of its Application it says that it wishes to state its "view as to how the determination of sovereignty over Pulau Ligitan and Pulau Sipadan

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[18] Malaysian Memorial, vol. 1, p. 1.

[19] Indonesian Memorial, vol. 1, p. 187.

[20] Malaysian Memorial, vol. 1, p. 114.

[21] *I.C.J. Reports 1990*, p. 118, para. 62.

*may or may not* affect" its legal rights and interests (emphasis added). In paragraph 4 (a), it says that ...

> "The interest of the Republic of the Philippines is solely and exclusively addressed to the treaties, agreements and other evidence furnished by the Parties and appreciated by the Court which have a *direct or indirect* bearing on the matter of the legal status of North Borneo." (emphasis added)

This is wholly lacking in precision or specificity.[22]

23. In any event, the legal status of Sabah as such does not have any relation to the question of sovereignty over Sipadan and Ligitan. As noted already, the Philippines' claim rests on the grant by the Sultan of Sulu in January 1878 to Baron van Overbeck and Mr. Alfred Dent. The grant concerned territory on the mainland of Borneo, "together with all the islands included therein within nine miles of the coast".[23] Ligitan and Sipadan lie more than nine miles from the coast and they were not included in the grant. Malaysia's title to them is completely independent of the grant of 1878 (even if that grant was capable of bearing the interpretation the Philippines puts on it, which it is not).

24. The dispute submitted by Indonesia and Malaysia to the Court rests on the interpretation of the Convention of 20 June 1891, concluded by Great Britain and the Netherlands. Spain was not a party to the Convention. The Convention is *res inter alios acta* as far as the Philippines is concerned.

25. It is significant that not one of the 33 Appendices, appended to the "Philippine Claim to North Borneo, Volume I" published by the Philippines in 1963, is related to the issue presented by the parties in the Special Agreement. Neither the 1891 Convention between Britain and the Netherlands, nor the

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[22] Subsequently it asserts that the Court's decision will "inevitably and most assuredly affect the outstanding territorial claim of the Republic of the Philippines to North Borneo", but it does not say how.

[23] Malaysian Memorial, vol. 2 Annex 9.

1900 Treaty between the United States and Spain, nor the 1907 Exchange of Notes, nor the 1930 Convention between Britain and the United States are included in the lengthy list of appended documents allegedly supporting the Philippines claim.[24]

26. The interest of a legal nature the Republic of Philippines refers to in its Application is much more general in scope. The Philippines declares:

> "A decision by the Court, or that incidental part of a decision by the Court, which lays down an appreciation of specific treaties, agreements and other evidence bearing on the legal status of North Borneo will inevitably and most assuredly affect the outstanding territorial claim of the Republic of the Philippines to North Borneo, as well as the direct legal right and interest of the Philippines to settle that claim by pacific means."

27. In the *Land, Island and Maritime Frontier Dispute case (El Salvador/Honduras), Application to Intervene*, the Chamber of the Court granted Nicaragua a limited permission to intervene, but did not accept the more general request:

> "The Chamber does not however consider that an interest of a third State in the general legal rules and principles likely to be applied by the decision can justify an intervention. Even when, as in the case of Malta's Application for permission to intervene in the case between Libya and Tunisia, the State seeking to intervene 'does not base its request for permission to intervene simply on an interest in the Court's pronouncements in the case regarding the applicable general principles and rules of international law', but 'bases its request on quite specific elements' in the case (*I.C.J. Reports 1981*, p. 17, para. 30), the interest invoked cannot be regarded as one which 'may be affected by the decision in the case' (*I.C.J. Reports 1981*, p. 19, para. 33). The consideration urged in paragraph 2 *(d)* of the Application is thus insufficient to show the existence of an interest of a legal nature."[25]

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[24] *Philippine Claim to North Borneo*, Manila, Bureau of Printing, 1963, Volume I, pp. 41-43.

[25] *I.C.J. Reports 1990*, p. 124, para. 76. See also p. 126, para. 82, p. 128, para. 84.

28. Likewise, in the present case, the Philippines have not shown that the alleged interest, their claim to North Borneo, "may be affected by the decision in the case".

29. The Philippines alleges an even vaguer legal interest as to "an appreciation of specific treaties, agreements and other evidence bearing on the legal status of North Borneo". Again this is wholly unparticularised, and any interest the Philippines may have is adequately protected by the terms of Article 59 of the Statute.

30. The truth of the matter is that the Philippines is trying, by way of an article 62 intervention, to put before the Court a completely different dispute, which raises against Malaysia the issue of sovereignty over the whole of Sabah and its people. This is unacceptable. In particular, it ignores the basic condition of consent (see Application, para. 7, where the Philippines asserts that consent is irrelevant). As the Report of the Advisory Committee of Jurists stated in 1920:

> "The Court is to decide whether the interest is legitimate and consequently whether the intervention is admissible. To refuse all right of intervention, might have unfortunate results. The essential point is to limit it to cases in which an interest of legal nature can be shown, so that political intervention will be excluded, and to give the Court the right of decision."[26]

31. This very same reason led the Court to refuse Italy permission to intervene in the *Continental Shelf case (Libyan Arab Jamahiriya/Malta)*. In its judgment on the *Application for Permission to Intervene*, the Court said:

> "It has been emphasized above that the Italian Application to intervene tends inevitably to produce a situation in which the Court would be seized of a dispute between Italy on one hand and Libya and Malta on the other, or each of them separately, without the consent of the latter States: Italy would thus become a party to one or several disputes which are not before

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[26] Quoted by S. Rosenne, *The Law and Practice of the International Court, 1920-1996* (1997) vol. III, p. 1484.

> the Court at present. In this way the character of the case would be transformed."[27]

32. Again in the *Land, Island and Maritime Frontier Dispute case (El Salvador/Honduras), Application to Intervene*, the Court remarked:

> "Intervention under Article 62 of the Statute is for the purpose of protecting a State's 'interest of a legal nature' that might be affected by a decision in an existing case already established between other States, namely the Parties to the case. It is not intended to enable a third State to tack on a new case, to become a new part, and so to have its own claims adjudicated by the Court ... Intervention can not have been intended to be employed as a substitute for contentious proceedings."[28]

33. Thus the Philippines' request fails to demonstrate a legal interest in the subject matter of the particular dispute between Malaysia and Indonesia and is inadmissible *in limine*.

### C. The Philippines request has no permissible object

34. In considering a request to intervene under article 62 of the Statute, it is essential to identify the object of the Request. The Philippines clearly understands this, since one of its sections is headed "The Object of the Intervention Requested". Yet the Philippines fails completely to state any permissible object.

35. In the section in question, the Philippines identifies three objects of its request (para. 5).

> *(a) "To preserve and safeguard the historical and legal rights... over the territory of North Borneo..."*

36. The first and evidently primary "object" of the Philippines is to advance and assist its claim to Sabah (para. 5 (a)). Despite its protestations

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[27] *I.C.J. Reports 1984*, p. 25, para. 41.
[28] *I.C.J. Reports 1990*, pp. 133-4, paras. 97, 99.

that "it does not intend to change the subject matter, the nature or the scope of the current proceedings between Indonesia and Malaysia", that is precisely the effect its intervention seeks to achieve.

37. Indonesia does not dispute Malaysia's sovereignty over Sabah. It accepts Malaysia's sovereignty under the 1891 Convention and subsequent instruments; the 1891 Convention is the *basis* of its claim to the two islands. Thus the question sought to be raised by the Philippines (the legitimacy of a claim to Sabah) is precisely *not* an issue in the case between Indonesia and Malaysia. For Indonesia or Malaysia to respond to any substantive statement that might be made by the Philippines would lead them both into questions which have nothing to do with the present case and which would be a pure distraction from the legal issues which the Court is called on to decide.

38. It may also be noted that the Philippines is one of many States which recognises that the two islands are part of Sabah. In connection with the recent hostage crisis arising from the seizure of Malaysians and others from Sipadan, the Philippines repeatedly characterised the abduction as having occurred "in Malaysia", "from an island resort in Malaysia" and "from a Sipadan diving resort in Malaysia". Illustrative statements are attached to these Observations as Annex 4.

### *(b) "To inform the Honourable Court..."*

39. Secondly, the Philippines states as an object of its intervention "to inform the Honourable Court of the nature and extent of the historical and legal rights of the Republic of the Philippines which may be affected by the Court's decision" (para. 5 (b)).

40. The Court needs no such information other than the following. The Philippines in 1962 made a spurious and legally unsupportable claim to Sabah as a whole. That claim has nothing to do with the particular islands in dispute.

Indeed, since the Philippines' claim is based on the 1878 Sulu grant, it self-evidently has no application to the islands, which lie beyond the scope of that grant.

41. Information about the Philippines' claim will do nothing to assist the Court in resolving the dispute between the parties to the Special Agreement, Malaysia and Indonesia. The case has now been fully pleaded, over three rounds of written pleadings with some 684 annexes and 136 maps deposited by the two parties. As a result of the extensive research done by the parties, there is not the slightest indication that any information about the alleged "historical and legal rights" of the Philippines has any bearing on this specific dispute. The Court is now fully informed about the dispute and can proceed to decide it, as between the parties, without any reference to the Philippines' claim.

### (c) *"Comprehensive conflict resolution"*

42. The third object cited by the Philippines is "to appreciate more fully the indispensable role of the Honourable Court in comprehensive conflict resolution and not merely the resolution of legal disputes". This is a purely abstract and general matter, on which the Court needs no instruction from the Philippines or anyone else. It is a gratuitous and impermissible object for an intervention.

43. Malaysia and Indonesia submitted to the Court a precise legal dispute over two islands, which dispute had arisen between them without any involvement whatever on the part of the Philippines. The resolution of that specific dispute will not be assisted in the slightest by the Philippines' intervention. Nor does any question of "comprehensive conflict resolution" arise. The Court is called on to resolve a specific claim made by Indonesia, not to range around a region comprehensively resolving its many disputes.

44. In any event there can be no resolution of a dispute in respect of a State which does not seek to become a party to a case,[29] and could not do so. In this regard it may be noted that the Philippines specifically exempts from the Court's jurisdiction under Article 36 (2) of the Statute all disputes concerning territory of or claimed by the Philippines.[30] Its concern for "comprehensive conflict resolution" stands in stark contrast with its own legal actions.

45. It may also be noted that the Philippines could have brought legal proceedings against Great Britain at any time from 1946 until 1962, before the act of self-determination which resulted in the federation of Malaysia. It failed to do so then. It should not be allowed at this late hour to advance its claim through the side door of article 62.

## D. In any event the Court ought to reject the request

46. The Court in dealing with requests for intervention under article 62 of the Statute has a power of appreciation. This is clear from the use of the word "may" in article 62 (1), from the terms of article 62 (2), and from the contrast with the word "right" in article 63. It is true that the Court does not have "any general discretion to accept or reject a request for permission to intervene for reasons simply of policy".[31] But an application to intervene has to be duly justified in the circumstances, and it is for the Court to appreciate whether this is the case.[32]

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[29] See Philippines Application, para. 6.

[30] Philippines Optional Clause Declaration of 23 December 1971, proviso (a) (ii): *United Nations Treaty Series*, vol. 808 p. 3. The Philippines' Declaration is attached as Annex 5.

[31] *Tunisia/Libya (Maltese Request for Intervention), I.C.J. Reports 1981*, p. 3 at p. 12, para. 17; repeated in *Libya/Malta (Italian Request for Intervention), I.C.J. Reports 1984*, p. 3 at pp. 8-9, para. 12.

[32] Thus S. Rosenne speaks of "the complete absence of anything automatic" in intervention, whether under article 62 or 63: *Intervention in the International Court of Justice*, Nijhoff, Dordrecht, 1993, p. 185.

47. It is respectfully submitted that, even if the Philippines' request were held to be admissible and to state an object which could be protected by intervention, it should be rejected. This is so, *inter alia*, for the following reasons:

(a) The Philippines can derive no possible benefit from Indonesia's winning the case. If it has a legal interest, it must be to support Malaysia's claim. Yet its intervention is obviously hostile to Malaysia.

(b) Malaysia categorically rejects the intervention. A third State should not be permitted to intervene, when its only legal interest can be to support the legal position of a party which rejects its intervention.

(c) To accept the intervention will be seen as lending credibility to a much broader (and indefensible) claim to the State of Sabah.

(d) That broader claim is completely unaffected by the case between Malaysia and Indonesia, or by the legal issues as they have been defined in the pleadings.

(e) That broader claim, based on the 1878 grant, on the face of it does not extend to the two islands in dispute in the present proceedings.

(f) If the Philippines wishes to inform the Court, the mere fact of its Application sufficiently does so.

### Concluding remarks and submissions

48. In effect what the Philippines seeks from the Court is recognition that "the legal status of North Borneo [sic] is a matter that the Government of the Republic of the Philippines considers as its legitimate concern". It is not the function of intervention to allow third States, without any legal risk to themselves, to pursue separate (and untenable) territorial claims. For these

reasons it is the case, as it was in *El Salvador/Honduras*, that the Philippines' request is "too general" to justify intervention.[33]

49. The present case is the first Asian territorial dispute brought to the Court for 40 years. It is the first dispute ever brought to the Court by a Special Agreement between two Asian States. It is respectfully submitted that the Parties to the Special Agreement should be allowed to deal with their own particular dispute without the gratuitous intervention of a third State, seeking to advance its own unfounded claims to a much wider territory.

50. In short, not merely has the Philippines no right to intervene, it has no claim to make. Malaysia urges the Court to reject the request.

Datuk Abdul Kadir Mohamad
Agent of Malaysia

Kuala Lumpur

2 May 2001

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[33] *ICJ Reports 1990*, p. 125, para. 37.

# ANNEX 1

## *General Assembly Official Records*, 1177th mtg., 27 November 1962

who have grown accustomed to basing their prosperity largely on the exploitation of other peoples are consumed by hatred of the peoples of the socialist States, which have given an example of how to expel foreign plunderers from one's home and how to assign one's own wealth and build one's own life.

120. Certain imperialist circles interested in fanning hatred of the Soviet Union and in attempting to undermine its prestige often try to shift this thankless task to others who are prepared to oblige them. I regret to say that among those who often prove obliging are some Canadian politicians with a markedly anti-Soviet bent. There is no need to go into the details of the Canadian representative's slanderous insinuations about the Soviet peoples, including the Ukrainians. We should merely like to say that his was a puerile attempt at substituting for the genuine problem of the peoples' liberation from colonialism, which calls for immediate solution, "problems" fabricated by the colonialists, who have lost their self-possession and their heads and are fighting a hopeless rearguard action against the national liberation movement.

121. It is interesting to note that in his statement, in which slander alternated with hypocritical sighs, the Canadian representative also tried to play on the pride of the Soviet peoples, upon whom he showered high-sounding epithets in an attempt to make the insincerity and tendentiousness of his remarks more palatable. He called the Ukrainian peoples "freedom-loving", apparently not realizing that from the lips of a champion of colonialism even well-deserved recognition of a people's qualities may sound like an insult. Let the Canadian delegation make no mistake about it: our people is aware of the true motives which impel Canadian statesmen, when addressing international or domestic audiences, to echo the tunes of imperialist reaction whenever reference is made to the Ukrainians and the other Soviet peoples. The Ukrainian people is truly freedom-loving, and that is precisely why it will not permit the imperialists and their yes-men to interfere in the internal affairs of our close-knit fraternal family of socialist peoples, which have attained independence, freedom and peace and are confidently building their bright communist future.

122. The threat to world peace and security will persist until all the peoples of the world are assured equality and independence and until the last link in the colonial chain has been smashed. The right of every people to put an end to foreign oppression is sacred and inalienable. We are certain that that right will inevitably triumph throughout the world.

123. My delegation will support any proposals aimed at the attainment of the noble objectives proclaimed in the Declaration on the granting of independence to colonial countries and peoples—that of the immediate and complete elimination of colonialism in all its forms and manifestations.

*Mr. Plimsoll (Australia), Vice-President, took the Chair.*

124. Mr. RAMOS (Philippines): The process of decolonization set in motion at the end of the Second World War constitutes one of the brightest chapters in the story of man's perennial quest for freedom. It has brought about a revolution which in scope and impact ranks with other great political developments which have profoundly affected the quality of civilization and the course of history.

125. Two potent forces have made this revolution possible. The first is the rise of nationalism which, pervading all ranks of society, supplied the moving power for the ultimate assertion of the right to self-determination and other basic human rights. The second is the growth of a world conscience which, sparked by the [illegible] dissemination of the libertarian principles enshrined in the Charter of the United Nations.

126. The United Nations itself has played a vital role in this revolution. It has served as a catalyst in the process of decolonization, channelling independence movements along peaceful lines and ensuring that the newly independent nations should immediately find their rightful place in a community of free States professing allegiance to the rule of law. The work of the Special Committee of Seventeen reflects the profound concern of the United Nations for the speedy liberation of the remaining colonial territories. The progress reported by that Committee is encouraging.

127. We have reason to feel gratified by this development, but the intensity of the debates on the issue of colonialism suggests that our work is far from done. For colonialism is a peculiar institution which does not respond uniformly to a given treatment. It follows the classic pattern of apparent cause and effect reversed, and its outstanding characteristic is the tenacity with which it clings to its chosen position. Thus in our own time, even as we strive to hasten the liquidation of old-style colonialism, we have seen the emergence of subtler forms of colonialism which are as dangerous in their implications as they are clever in disguising their true character. It is an essential part of our task to be on our guard against all manifestations of this newer form of colonialism, to expose them wherever they may exist and to oppose their perpetuation with the same energy and determination that we have devoted to the liquidation of the older forms of colonialism.

128. Let us never forget that colonialism in any form is never justified. For all forms of colonialism assume, as a first principle, the evil doctrine that one group of people is superior to another. In its grossest form, colonialism violates the fundamental human rights of the subject people, obstructs and prevents their prosperity, and ultimately negates their national personality.

129. My country's special concern with the issue of colonialism arises from the fact that for over 400 years we Filipinos were a colonial people. We were a colony of Spain for more than 300 years and were under the United States of America for nearly half of a century. To a greater or less degree, we therefore share with the peoples of the former colonies the traumatic experience of having been ruled against our will by alien Powers.

130. The Filipino people are among the oldest revolutionaries in the world. During the almost four centuries of Spanish rule, we rose in revolt on the average of once every two years. The last of these periodic uprisings finally culminated in 1896.

131. On 12 June of that year, the leader of the Philippine revolutionary forces proclaimed the Republic of the Philippines—the first free democratic State to emerge in colonial Asia. In defence of this first Philippine Republic, our people fought the United States of America in a war that lasted for more than three years and ended only when we had [illegible]

left with which to resist the superiority in arms and numbers of the United States forces.

132. Thereafter, our people embarked upon a determined and uncompromising campaign for immediate, absolute and complete independence. This campaign was carried on peacefully through constitutional means, thanks to the adoption by the United States of America of a policy based on the recognition of the Filipino people's right to self-determination. However, it took our people more than thirty years of peaceful struggle for that policy to be embodied in legislation setting a definite date for the recognition of Philippine independence. And after those thirty years, another decade passed before the Republic of the Philippines was finally re-established.

133. This historic event took place on the fourth of July, 1946, at the very beginning of the process of decolonization to which I have referred. The re-established Philippine Republic, a Charter Member of the United Nations, was the first of the former colonies in Asia to function as a free and independent State. In that sense, it may be said to have ushered in the era of emancipation of colonial peoples which we are now seeking to consolidate and bring to fulfilment.

134. After this brief historical review of the independence movement in the Philippines, highlighting the position of my Government on the question of colonialism, I now wish to address myself to a part of the report of the Special Committee of Seventeen which is before us in document A/5238. I refer to that part which affects our sovereignty over North Borneo in relation to a project to establish a new federation called the Federation of Greater Malaysia.

135. These two subjects—sovereignty over North Borneo and Federation of Greater Malaysia—are of particular interest to the Philippines because the establishment of this new Federation of Greater Malaysia would involve the transfer of sovereignty over North Borneo. The Philippines has put forward a formal claim of sovereignty over North Borneo. A dispute has arisen between the Philippines and the United Kingdom over this issue, a dispute which yet remains unsettled.

136. The Vice-President and Secretary of Foreign Affairs of the Philippines, in a policy statement made before this Assembly in the morning of 27 September 1962, referred briefly to the claim of the Philippine Government to the territory of North Borneo. He said among other things, and I quote:

> "Our claim has been put forward with sincere assurances that the issue should be settled by peaceful means, and without prejudice to the exercise of the right of self-determination by the inhabitants of North Borneo, preferably under United Nations auspices." [1134th plenary meeting, para. 35.]

137. Later in the same meeting, the representative of the United Kingdom said:

> "... with regard to the claim to North Borneo, I must place it on record that the United Kingdom has no doubt as to its sovereignty over the territory" [*ibid.*, para. 137].

By these statements of representatives of the two Governments concerned, the issue of sovereignty over North Borneo was clearly joined.

138. The dispute between the Philippines and the Un[illegible]ingdom regarding sovereignty over North Bor[illegible]arises mainly from the different interpretations which the two countries have placed on a deed that was signed on 22 January 1878 by Sultan Jamal Al Alam, the head of the Sultanate of Sulu. Before this date, the Sultan of Sulu was the undisputed sovereign and ruler of North Borneo. The deed is in Arabic characters, and the text is in the Malayan language. The key word is the Malayan word "padjak", which means "lease" and which in our view clearly indicates that the territory was leased, not sold or ceded as the United Kingdom Government erroneously claims.

139. The manner of payment, which is made annually, bears out our conviction that that agreement was a lease agreement. So does the amount of rental money, which was 5,000—later increased to 5,300—Malayan dollars per annum, about 1,600 United States dollars a year or 130 United States dollars a month, for a territory comprising 29,000 square miles, approximately the size of Ireland.

140. When the original lessee, a private company called the British North Borneo Company, transferred its rights to the territory to the United Kingdom on 26 June 1946, it transferred leasehold rights, not sovereign rights, for the simple reason that the company could not transfer rights that it did not itself have. And when, with unprecedented haste, the United Kingdom Government annexed the territory of North Borneo as a Crown colony on 10 July 1946—six days after the re-establishment of the Republic of the Philippines—the United Kingdom Government performed an act of questionable legality.

141. Seven years before, a British court had handed down an opinion, which reads:

> "It is abundantly clear that the successors in sovereignty of the Sultan of Sulu are the Government of the Philippine Islands. . .".

This quotation, which throws a revealing light on the question of sovereignty over North Borneo, is from a decision by Chief Justice Macaskie of the High Court of North Borneo in a suit that was brought by the heirs of Sultan Jamalul Kiram, the head of the Sulu Sultanate from 1894 until his death in 1936. While we are not prepared to accept all the pronouncements made by Justice Macaskie, we are making reference to his decision for the purpose of bringing out the reasons which impelled the present Sultan of Sulu to cancel the lease over the territory a few years later.

142. The suit before the Borneo courts was in the nature of an interpleader initiated for the purpose of getting a judicial pronouncement as to who were the heirs of the late Sultan Jamalul Kiram entitled to receive the rental provided for in the deed of 1878. In his decision Justice Macaskie made a distinction between what he called "the private heirs" of the deceased Sultan, who were entitled to the annual payment of 5,300 Malayan dollars, and the "successors in sovereignty" of the Sultan. Justice Macaskie declared Princess Tarhata Kiram and eight others the private heirs of the Sultan and the Philippine Government as the successors in sovereignty.

143. The United Kingdom Government was fully aware of the opinion of Justice Macaskie that the successors in sovereignty of the Sultan of Sulu were the Gov-

[illegible] of the Philippine Islands. It was likewise aware of the fact that Princess Tarhata Kiram and eight other had been declared by the High Court of North Borneo as the private heirs of the said Sultan. Yet when it annexed North Borneo on 10 July 1946, and five days later assumed sovereignty over the territory, the United Kingdom Government notified neither the Philippine Government nor the Sultan's heirs of the annexation and the assumption of sovereignty. A distinguished American, a great advocate of the principle of self-determination, none other than the Honourable Francis Burton Harrison, who has made a legal study of the North Borneo case, has called the annexation of North Borneo by the United Kingdom Government an act of political aggression. In 1957 Sultan Esmail Kiram issued a proclamation cancelling the lease of 1878. A formal notice of the cancellation was sent to the United Kingdom Government in London, to the British North Borneo Company in Jesselton and to the Secretary-General of the United Nations in New York.

144. Let us consider another portion of the report of the Special Committee which deals with the question of self-determination for the people of North Borneo. The Committee has circulated a number of petitions concerning colonial territories. Among these petitions is one 1/ dated 9 September 1962 from political parties in North Borneo, Sarawak and Brunei, requesting the United Nations "to intervene in the proposed transfer of sovereignty in Sarawak and Sabah". North Borneo is also known as Sabah—"on the ground that such a transfer is a denial to the peoples in these territories of their right to self-determination and of their right to complete independence". Alternatively, the petition asks the United Nations to organize and conduct a plebiscite before the transfer of sovereignty.

145. The petition reads in part as follows:

> "13. The assessment of the [Cobbold] Commission was that about one third of the population strongly favoured realization of Malaysia without conditions, one third favoured it with conditions and safeguards and the rest against. This assessment was totally wrong and could not be supported by facts and cannot be accepted by independent impartial observers."

146. The Cobbold report 2/ itself makes this admission:

> "In assessing the opinion of the peoples of North Borneo ... we have only been able to arrive at an approximation. We do not wish to make any pretence that it may not change in one direction or the other in the future. Making allowance for all the difficulties and for our inability to reach every part of these large territories, we have arrived at a general assessment of opinion with reasonable confidence, based on individual and representative evidence presented before us."

147. Another part of the Cobbold report contains the admission that because of "insufficient time" the inhabitants of the territory could not make a "careful study" regarding the implications of the Malaysia proposals for North Borneo. Still another part states:

> "There had been no elections. ... Only recently have plans been made for elections to District Councils and Town Boards." 3/

148. In other words, since the year 1881, when the British North Borneo Company started administering North Borneo for the Sultan of Sulu, and even as late as 1946, when the United Kingdom Government annexed North Borneo as a Crown colony the inhabitants of the territory have not been given the opportunity to elect even local officials.

149. A parallel situation obtains in the field of education. The figures given in the Cobbold report show that out of the total population aged ten years or over there are only 72,000 literates; 257,000 are illiterate. From an indigenous population of over 300,000, only two persons have gone through college.

150. It is thus noteworthy that the so-called "Calendar of Constitutional Advance" [A/5238, annex I] presents the fact that a decision in principle had already been arrived at by the Governments concerned that the proposed Federation of Greater Malaysia, which will include North Borneo, will come into being on 31 August 1963, but makes no mention whatsoever of an important part of the decision, namely, the accord reached by those Governments that within six months they will enter into a formal agreement providing for the transfer of sovereignty over North Borneo to the proposed Federation of Greater Malaysia. The six-month period presumably started on the day the decision was arrived at—about the end of July or early August of this year.

151. The schedule of steps leading to the incorporation of the territory into the proposed Federation of Greater Malaysia, the terminal date of which is 31 August 1963, makes it virtually certain that the people of the territory will, after that date, have forfeited their right to express their real opinion on the all-important question of self-determination.

152. Before that happens we earnestly hope that the Philippine claim to North Borneo will have been settled on the basis of legality and justice. For under that claim the right of the people of North Borneo to self-determination would be assured.

153. The territory of North Borneo is very close to the Philippines. There are many islands in the Philippine Archipelago—the Turtle Islands and the Mangsee Islands—which lie within a stone's throw of North Borneo. From the southernmost islands of the Philippine Archipelago, one can paddle to North Borneo in small native boats or canoes.

154. Thus, from the point of view of national security, the Philippines has a vital stake in the future of North Borneo. The territory is like a cork that closes our great inland sea, the Sulu Sea, and is therefore of great strategic importance for the Philippines.

155. However, in putting forward its valid claim to sovereignty over North Borneo, the Philippines has no desire or intention to ignore the wishes of the people of the territory. North Borneo is not a Pacific atoll inhabited by gooney birds, or an Antarctic island inhabited by penguins. It is inhabited by nearly a

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1/ A/AC.109/PET.60, mimeographed only.

2/ Report of the Commission of Enquiry, North Borneo and Sarawak, 1962 (London, Her Majesty's Stationery Office, Command Paper 1794, chap. 3, para. 143).

3/ Ibid., para. 94.

half-million people whose right to self-determination must be considered and respected.

156. It is for this very reason that President Macapagal of the Philippines, on 27 July 1962, gave the following solemn assurance:

> "The Philippines is legally committed to the principle of self-determination of peoples. Therefore, if the necessity of ascertaining the wishes of the inhabitants of North Borneo regarding their future should arise at any time, the Philippines would support their desire to exercise this right, preferably in a plebiscite under the auspices of the United Nations."

157. This solemn assurance was reiterated [1124th meeting, para. 25] by the Vice-President and Secretary of Foreign Affairs of the Philippines in his policy statement before this Assembly, which I have already referred to.

158. My Government has spared no effort to have this dispute over North Borneo settled amicably and speedily on a bilateral basis.

159. In response to the growing pressure of public opinion in the Philippines, the House of Representatives of the Philippine Congress unanimously approved, on 24 April 1962, a resolution urging the President of the Philippines to claim sovereignty over North Borneo. However, before the President could implement that resolution, the Government of the United Kingdom informed the Philippine Government that it would oppose and resist any such claim, in an effort to forestall the presentation of the claim even before its merits had been considered.

160. On 22 June 1962, My Government took the first step towards a negotiated solution of the North Borneo problem. It informed the United Kingdom of the Philippine claim to sovereignty over the territory and requested of the United Kingdom that conversations be held either in Manila or London to discuss all the relevant points at issue.

161. This request was pointedly ignored. The Philippine Government found it necessary to send an aide-mémoire reiterating its request for bilateral talks. It was not until 7 August 1962 that the Philippine Government received an aide-mémoire from the United Kingdom. That aide-mémoire, however, was completely silent on the Philippine request for bilateral talks. On 12 September, shortly before the present General Assembly session, another note was sent to the British Government reiterating for the second time the Philippine request for bilateral talks.

162. My Government is seriously concerned about the somewhat cavalier treatment which our successive requests over a three-month period have received from the United Kingdom. We are finding it increasingly difficult not to draw the conclusion that the United Kingdom is deliberately ignoring our claim in an apparent effort to present us with a fait accompli.

163. For, in the meantime, the six-month period during which the transfer of the territory of North Borneo to the projected Federation of Greater Malaysia is contemplated is about to expire. My Government cannot accept this situation with equanimity, particularly because, as we have pointed out, the transfer arrangements contain no provisions for the effective exercise of the right to self-determination by the people of North Borneo. We have, therefore, informed the Governments concerned that we can in no way accept the London Agreement affecting the territory of North Borneo as a fait accompli tending to set aside the Philippine claim of which these Governments are fully aware. We have likewise informed them that the claim of the Philippines to North Borneo subsists, and will continue to subsist, until the dispute is resolved by peaceful means in accordance with the Principles of the United Nations Charter.

164. My Government has viewed with misgivings what appears to be a studied indifference to our repeated requests for bilateral talks, but we are confident that the United Kingdom, which the Philippines considers an ally in the cause of world peace, will not continue to ignore our just claim. Simple justice and the best interests of the peoples concerned dictate that our dispute with the United Kingdom over North Borneo be settled before the creation of a Federation of Greater Malaysia, in order to ensure the exercise of the right of the people of North Borneo to self-determination and, at the same time, to ensure the peace, friendship and good will of the peoples in that part of the world.

*Mr. Muhammad Zafrulla Khan (Pakistan) resumed the Chair.*

165. The PRESIDENT: I recognize the representative of the United Kingdom in exercise of his right of reply.

166. Sir Patrick DEAN (United Kingdom): The representative of the Philippines, in the course of the speech he has just delivered, referred to a claim by his Government to the territory of North Borneo. He supported his claim with a number of statements, arguments, and quotations.

167. My delegation will study these arguments, statements, and quotations with the care which they no doubt deserve. Meanwhile, I would say only this: this is an entirely new claim. Both the Philippine Constitution of 1946 and the 1961 resolution of the Philippine Congress on territorial waters, defined the boundaries of the Philippines to the exclusion of North Borneo. Moreover, there is strong opposition to the Philippine claim from the population of North Borneo. Leaders of all five political organizations in North Borneo sent an open letter to the President of the Philippines last month in which they said:

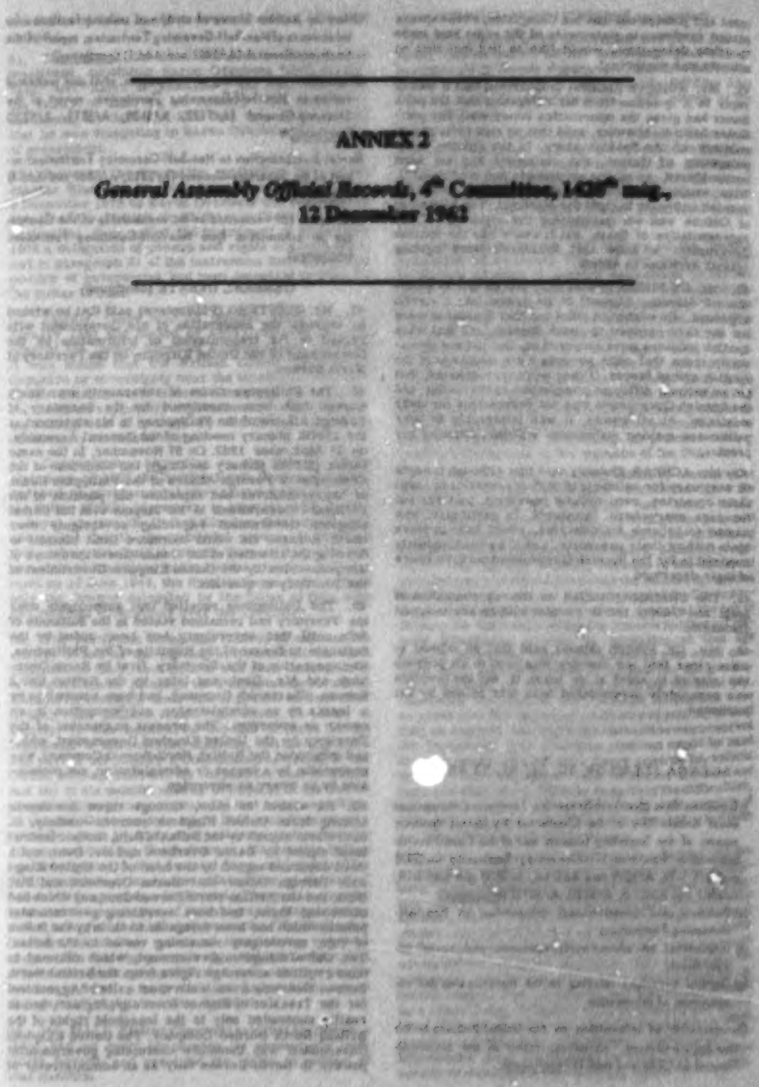
> "We do not believe—and our people do not believe—that the Government of the Republic of the Philippines has any claim over any land whatsoever because of the former Sultan of Sulu, or in any other way. We believe that, no matter what anyone may say about this so-called claim, not one of the peoples of North Borneo has any wish to become part of the Republic of the Philippines, nor would any of them consent to this."

168. In this connexion, I am authorized by my Government to state once again that the United Kingdom Government has no doubt as to its sovereignty over the territory of North Borneo, and I wish formally to reserve its rights in this connexion.

169. Perhaps I may add that if, after a closer study, any further reply seems to be required to the recent statement of the representative of the Philippines, my delegation reserves the right to intervene later in this debate.

## ANNEX 2

## *General Assembly Official Records*, 4th Committee, 1420th mtg., 12 December 1962



ment and pointed out that his delegation, which always placed credence in statements of the same kind made by other delegations, would like to feel that such an attitude was reciprocal.

42. Mr. ACHKAR (Guinea) emphasized that it was in reply to a question from his delegation that the petitioner had given the information concerned. The petitioner had not, however, said that he was referring to soldiers of the Spanish army. In the opinion of the delegation of Guinea, the statement had not been contradicted, as all the petitioners had confirmed it. What would be unacceptable would be to authorize Spanish nationals to fight for Portugal. The delegation of Guinea was not questioning the statement of the representative of Spain, but it would like the Spanish Government to know that Spaniards were fighting against Africans in Africa.

43. Mr. DE PINIES (Spain) said that he had no intention of allowing himself to be drawn into a sterile argument. He wished to point out that Spaniards were not the only persons to speak Spanish, and that when Spanish soldiers were referred to, that did not necessarily mean that such persons were members of the Spanish armed forces. If they were mercenaries, that put an entirely different complexion on the matter, and the Spanish Government was not responsible for their existence. At all events, it was intolerable to hear petitioners making statements without producing any proof.

44. Mr. ACHKAR (Guinea) said that although it might be very easy for nationals of certain countries to leave their countries, even without passports, that was not the case everywhere. Spaniards, in particular, who wanted to become mercenaries, would have to leave Spain without their passports, and it was consequently impossible for the Spanish Government not to be aware of their departure.

45. The CHAIRMAN called on the representatives of Spain and Guinea not to persist with an acrimonious discussion.

46. Mr. DE PINIES (Spain) said that he wished to make clear that his country was open to all persons who wanted to enter it or leave it, but the question was completely unconnected with that raised by the petitioner.

## AGENDA ITEMS 49, 50, 51, 52, 53 AND 55

**Information from Non-Self-Governing Territories transmitted under Article 73 e of the Charter of the United Nations: reports of the Secretary-General and of the Committee on Information from Non-Self-Governing Territories (A/5078 and Add.1-19, A/5079 and Add.1-6, A/5080 and Add.1-19, A/5081 and Add.1-5, A/5120, A/5215) (*continued*):**

**(a) Political and constitutional information on Non-Self-Governing Territories;**

**(b) Information on educational, economic and social advancement;**

**(c) General questions relating to the transmission and examination of information**

**Dissemination of information on the United Nations in the Non-Self-Governing Territories: report of the Secretary-General (A/5244 and Add.1) (*continued*)**

**Offers by Member States of study and training facilities for inhabitants of Non-Self-Governing Territories: report of the Secretary-General (A/5262 and Add.1) (*continued*)**

**Preparation and training of indigenous civil and technical cadres in Non-Self-Governing Territories: report of the Secretary-General (A/5122, A/5125, A/5215, A/5238) (*continued*)**

**Racial discrimination in Non-Self-Governing Territories: report of the Secretary-General (A/5275, A/5249 and Add.1) (*continued*)**

**Election to fill vacancies in the membership of the Committee on Information from Non-Self-Governing Territories (*continued*)**

### GENERAL DEBATE (*continued*)

47. Mr. QUINTERO (Philippines) said that he wished to express the reservations of his Government with regard to the transmission of information by the Government of the United Kingdom on the Territory of North Borneo.

48. The Philippine claim of sovereignty over North Borneo had been mentioned by the Secretary of Foreign Affairs of the Philippines in his statement at the 1134th plenary meeting of the General Assembly, on 27 September 1962. On 27 November, in the same forum (1177th plenary meeting), the Chairman of the Committee of Foreign Affairs of the Philippine House of Representatives had explained the position of the Philippine Government in its dispute with the United Kingdom Government regarding sovereignty over North Borneo. He would therefore limit himself to drawing the attention of the Committee to the nature of the possession by the United Kingdom Government of the Territory in question.

49. The Philippines recalled that sovereignty over the Territory had remained vested in the Sultanate of Sulu until that sovereignty had been ceded by the Sultanate in favour of the Republic of the Philippines. The occupation of the Territory, first by Baron Overbeck and Mr. Dent, and later by the British North Borneo (Chartered) Company, had been occupation by a lessee or an administrator, not occupation by an owner or sovereign. The present possession of the Territory by the United Kingdom Government, which had succeeded the British North Borneo Company, was possession by a lessee or administrator, not possession by an owner or sovereign.

50. He wished to show, through three documents coming from United Kingdom sources—namely, an instrument signed by the Sultan of Sulu, another instrument signed by Baron Overbeck and Mr. Dent, and a third document signed by the head of the United Kingdom Foreign Office—that Baron Overbeck and Mr. Dent, and the British North Borneo Company which had succeeded them, had been exercising governmental powers which had been delegated to them by the Sultan of Sulu, sovereignty remaining vested in the Sultan. The United Kingdom Government, which claimed to have acquired sovereign rights from the British North Borneo Company in an instrument called "Agreement for the Transfer of Borneo Sovereign Rights", had in reality succeeded only to the beneficial rights of the British North Borneo Company. The United Kingdom Government was therefore exercising governmental powers in North Borneo only as an administrator of

the Sultan of Sulu, in whom sovereignty had remained vested.

51. The first of the three documents which he had mentioned, appointing Baron Overbeck "Datu Bendahara" and "Rajah of Sandakan", had been issued by the Sultan of Sulu on 22 January 1878, and in that document, the Sultan of Sulu had very plainly stated that he was delegating to Baron Overbeck his powers of government.

52. Secondly, there was the application for a Royal charter filed with the United Kingdom Government on 2 December 1878 by Baron Overbeck and Mr. Dent on behalf of the British North Borneo Company. In that application, they called the instrument of 22 January 1878 a delegation of powers and rights of government, and in paragraph 31 of the instrument they stated that powers of government had been delegated to them by the Sultan of Sulu.

53. Thirdly, there was an official letter dated 7 January 1882 and signed by Earl Granville, the then head of the United Kingdom Foreign Office, in which it was stated that the British Crown assumed no dominion or sovereignty over the territories occupied by the British North Borneo Company, did not grant the Company any powers of government, and recognized the delegation of powers by the Sultan, in whom sovereignty remained vested.

54. Consequently, according to the Foreign Office statement of 1882 the British North Borneo Company had had no governmental power not delegated to it by the Sultan of Sulu. Moreover, in granting the Company a Royal charter the United Kingdom Government had not vested it with governmental powers. It followed that, when the British North Borneo Company had transferred its rights to the United Kingdom Government on 10 June 1946, the British Crown had acquired only the powers delegated by the Sultan of Sulu, who had retained sovereignty over the Territory.

55. The Philippine delegation desired to express the anxiety it felt at the fighting in Brunei that had been reported in the Press. Brunei was near the territory of North Borneo. Although the Philippine Government claimed sovereignty over North Borneo and not over Brunei, the conflict there was bound to cause it anxiety. It was opposed to the use of force for the settlement of international disputes, and that principle was part of the country's Constitution as well as of the United Nations Charter. Its respect for that principle had led it six months earlier to request of the United Kingdom Government repeatedly that representatives of the two Governments might hold a conference in a friendly spirit to study the problems and settle the dispute concerning North Borneo. No answer had so far been given to that request for a conference. The Philippine delegation had no information on the actual causes of the troubles in Brunei. The press reports said that the population of Brunei was fighting because it had been refused self-determination. The Philippine Government had no means of determining who was responsible for the present regrettable situation, but it knew that history was full of cases in which a people had fought because its just claims had not been met or its essential rights had been ignored.

56. Mr. WALL (United Kingdom) said that his Government had no doubt concerning its sovereignty over North Borneo, and reserved its rights in respect of that question.

## HEARING OF PETITIONERS (continued)

*At the invitation of the Chairman, Mr. Louis [illegible] Maho, representative of the Mouvement pour l'indépendance de la Guinée équatoriale, and Mr. José Perea Epota, representative of the Partido Político Idea Popular de la Guinea Ecuatorial, took places at the Committee table.*

57. Mr. MAHO (Mouvement pour l'indépendance de la Guinée équatoriale) thanked the Committee for permitting him to submit his views on the situation in Equatorial Guinea. He was confident that the movement he represented would receive from the United Nations the support which would enable Equatorial Guinea rapidly to achieve independence.

58. After summarizing the history of the Spanish occupation of Fernando Póo and Río Muni, he dwelt on certain aspects of Spanish domination in the two territories. Since Equatorial Guinea was essentially an agricultural country, the Spaniards had from the outset elected to occupy the most fertile land. The indigenous inhabitants, ejected from that land and reduced to servitude, had no longer been able to compete with the Spanish farmers. In spite of their poverty they had continued to cultivate their lands satisfactorily until in 1948 the Spanish authorities had passed a law on land clearance prohibiting Guineans from possessing or cultivating more than four hectares except under certain conditions. In practice the law benefited Europeans at the expense of the Guineans.

59. The progress of a country could be measured by the degree of its inhabitants' education. Since the Spanish occupation, education had been totally neglected. Primary schooling, in both government and mission schools, was inefficient and aimed at training lower-grade employees and workers. Secondary education was equally useless, because of the incompetence of the teachers and the racial segregation practised in the schools. An ordinance of the Governor-General obliged Guineans to leave school at the age of fifteen, for the local authorities considered that indigenous inhabitants coming to education at that age became dangerous. The only Guineans who could continue their studies were those chosen for the government service, to do the menial work for the lowest pay. Otherwise the physical and financial difficulties were so great that few Guineans could stay at school, even if they so desired, and in general education was reserved for Europeans. The education problem would be hard to solve under Spanish rule; every scheme for reform that had been submitted to the Governor-General had been rejected. Nevertheless, in spite of the difficulties, Equatorial Guinea had enough young men capable of filling all indispensable posts once the country had been set free from Spanish oppression.

60. Society in Equatorial Guinea was divided into two completely separate groups, white and black. Admittedly certain barriers were disappearing and some mingling of the population was taking place, but generally speaking those changes would deceive only the casual visitor, and the difference between the two categories of the population remained. The social problem could not be solved while the Spaniards went on treating the indigenous inhabitants as beasts of burden and not as human beings. The Africans of Equatorial Guinea lived in a humiliating situation at an extremely low social level. The wages paid to a white worker and to a black worker for the same job differed enormously. The Mouvement pour l'indépendance de la Guinée équatoriale desired for its country the benefit of article 73

# ANNEX 3

## United Nations Malaysia Mission Report, "Final Conclusions of the Secretary-General", 14 September 1963

## UNITED NATIONS MALAYSIA MISSION REPORT

## Final Conclusions of the Secretary-General

In response to the request made by the Governments of the Federation of Malaya, the Republic of Indonesia, and the Republic of the Philippines, on 5 August 1963, I agreed to ascertain, prior to the establishment of the Federation of Malaysia, the wishes of the people of Sabah (North Borneo) and Sarawak. As foreseen in my communication of 8 August 1963, a Mission was established, comprising two teams, one for Sarawak and the other for Sabah (North Borneo), working under the supervision of my personal representative. The Mission has now completed the inquiry assigned to it, and has reported to me.

I wish, first of all, to express my gratitude to the three Governments for the confidence they placed in me by requesting that I should undertake the task of ascertaining the wishes of the population of Sarawak and North Borneo (Sabah) prior to the establishment of Malaysia. I also wish to express my appreciation to the Government of the United Kingdom and to the authorities of the two territories for having given their agreement to the inquiry and their full co-operation to the Mission.

It was always understood that the ascertainment would be completed within a limited period of time, and my communication of 8 August noted that every effort would be made to complete the task as quickly as possible. I later informed the Governments concerned that I would endeavour to report my conclusions to them by 14 September. During the course of the inquiry, the date of 16 September 1963 was announced by the Government of the Federation of Malaya with the concurrence of the British Government, the Singapore Government and the Governments of Sabah and Sarawak, for the establishment of the Federation of Malaysia. This has led to misunderstanding, confusion, and even resentment among other parties to the Manila agreement, which could have been avoided if the date could have been fixed after my conclusions had been reached and made known.

There was no reference to a referendum or plebiscite in the request which was addressed to me  I was asked to ascertain the wishes of the people "within the context of General Assembly resolution 1541 (XV), Principle IX of the Annex, by a fresh approach" which in my opinion was necessary "to ensure complete compliance with the principle of self-determination within the requirements embodied in Principle IX", taking into consideration certain questions relating to the recent elections  The Mission accordingly arranged for consultations with the population through the elected representatives of the people, leaders of political parties and other groups and organisations, and with all persons who were willing to express their views, and every effort was made to ascertain the wishes of the special groups (political detainees and absentees) mentioned in the Manila Joint Statement  The Mission gathered and studied all available documents, reports and other material on the governmental institutions, political organization, electoral processes in the two territories, and other matters relevant to its terms of reference

The Governments of the Federation of Malaya, the Republic of Indonesia and the Republic of the Philippines deemed it desirable to send observers to witness the carrying out of the task, and the Government of the United Kingdom decided that it also wished the same facility  Although I did not consider the arrangements for observers to be part of the Secretary-General's responsibility, I endeavoured to help the Governments concerned to reach agreement, and I am pleased that an understanding was finally arrived at so that observers of all the Governments concerned could be present during at least part of the inquiry  It is a matter for regret that this understanding could not have been reached earlier, so that all observers could have been present in the territories for the entire period of the inquiries and that questions of detail pertaining to the status of the observers unnecessarily delayed even further their arrival  A more congenial atmosphere would have been achieved if the necessary facilities had been granted more promptly by the Administering Authority  The Mission, however, made its records, including tape recordings of all its hearings, available for the use of the observer teams to enable them to inform themselves as fully as possible of what had occurred before their arrival

The basic assessment which I was asked to make has broader implications than the specific questions enumerated in the request addressed to me by the three Governments. As mentioned previously, I was asked to "ascertain, prior to the establishment of the Federation of Malaysia, the wishes of the people of Sabah (North Borneo) and Sarawak within the context of General Assembly resolution 1541 (XV), Principle IX of the Annex, by a fresh approach, which in the opinion of the Secretary-General is necessary to ensure complete compliance with the principle of self-determination within the requirements embodied in Principle IX".

Concerning the integration of a non-self-governing territory with an already independent State, Principle IX provides:

> "Integration should have come about in the following circumstances:
>
> (a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;
>
> (b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes."

I have given consideration to the circumstances in which the proposals for the Federation of Malaysia have been developed and discussed, and the possibility that people progressing through the stages of self-government may be less able to consider in an entirely free context the implications of such changes in their status, than a society which has already experienced full self-government and the determination of its own affairs. I have also been aware that the peoples of the territories are still striving for a more adequate level of educational development.

Having reflected fully on these considerations, and taking into account the framework within which the Mission's task was performed, I have come to the conclusion that the majority of the peoples of Sabah (North Borneo) and of Sarawak, have given serious and thoughtful consideration to their future, and to the implications for them of participation in a Federation of Malaysia. I believe that the majority of them have concluded that they wish to bring their dependent status to an end and to realize their independence through freely chosen association with other peoples in their region with whom they feel ties of ethnic association, heritage, language, religion, culture, economic relationship, and ideals and objectives. Not all of these considerations are present in equal weight in all minds, but it is my conclusion that the majority of the peoples of the two territories, having taken them into account, wish to engage, with the peoples of the Federation of Malaya and Singapore, in an enlarged Federation of Malaysia through which they can strive together to realize the fulfilment of their destiny.

With regard to the more specific questions referred to me, my conclusions, after the examination and verification reported by the Mission, are:

(a) Malaysia has been the subject of wide-spread and intensive public debate, and was a major issue in the recent elections in the two territories;

(b) Electoral registers were properly compiled;

(c) The elections took place in an atmosphere free enough to enable the candidates and political parties to put their case before the electorate, and the people were able to express themselves freely by casting their votes in a polling system which provided the basic safeguards for secret balloting, and measures for the prevention and correction of abuses;

(d) The votes were properly polled and counted.

(e) Persons otherwise eligible to vote but who were unable to do so because of detention for political activities, or imprisonment for political offences numbered somewhat less than 100 in Sarawak, and even less in Sabah (North Borneo) at the time of the elections. Testimony given by this group, especially in Sarawak, indicated that they would have opposed the Federation of Malaysia if they had participated in the election. The actual votes of this group would not have been sufficient to have had a material effect on the result. The Mission has given much attention to the possible effect which the absence of these persons, some of whom were officials of the anti-Malaysia party, might have had on the campaign. The Mission considered the similar question concerning some 164 persons whose activity was restricted to some extent, but who retained the right to vote. Noting that the anti-Malaysia party scored convincing electoral victories in many of the areas to which these persons belonged, I accept the Mission's conclusion that a substantial limitation of the campaigning potential of the group opposed to the Federation of Malaysia has not occurred, so as seriously and significantly to have affected the result of the election.

(f) The Mission made special efforts to obtain reliable information regarding persons who were absent from the territories at the time of the election, particularly as a result of possible political or other intimidation. The evidence available indicated that the number of such persons, otherwise qualified to vote, did not exceed a few hundred, and that their number could not have affected the results of the election. I note that the principal officials of the party in Sarawak opposed to the Federation of Malaysia, agree with this assessment, and I accept it.

Bearing in mind the fundamental agreement of the three participating Governments in the Manila meetings, and the statement by the Republic of Indonesia and the Republic of the Philippines that they would welcome the formation of Malaysia provided that the support of the people of the territories was ascertained by me and that, in my opinion, complete compliance with the principle of self-determination within the requirements of General Assembly resolution 1541 (XV), Principle IX of the Annex, was ensured, my conclusion, based on the findings of the Mission, is that on both of these counts there is no doubt about the wishes of a sizeable majority of the peoples of these territories to join in the Federation of Malaysia.

In reaching my conclusions, I have taken account of the concern expressed with regard to the political factors resulting from the constitutional status of the territories and about influences from outside the area on the promotion of the proposed Federation. Giving these considerations their due weight, in relation to the responsibilities and obligations established in Article 73 and General Assembly resolution 1514 (XV) in respect of the territories, I am satisfied that the conclusions set forth above take cognizance of the requirements set forth in the request addressed to me on 5 August 1963 by the Foreign Ministers of the Republic of Indonesia, the Federation of Malaya and the Republic of the Philippines.

Before concluding, I would like to pay a tribute to my Personal Representative, Mr. L. Michelmore, my Deputy Representative, Mr. G. Janecek, and to all the members of the United Nations Malaysia Mission who accomplished a sensitive and difficult task in a relatively short period, but at the same time in a thorough and wholly adequate manner. In a sense, it was a pity that the work of the Mission had to be accomplished within certain deadlines. But I do feel that, while more time might have enabled the Mission to obtain more copious documentation and other evidence, it would not have affected the conclusions to any significant extent.

From the beginning of this year I have been observing the rising tension in South East Asia on account of the differences of opinion among the countries most directly interested in the Malaysia issue. It was in the hope that some form of United Nations involvement might help to reduce tension that I agreed to respond positively to the request made by the three Manila powers. I would hope that the exercise in which my colleagues and I have been involved in this regard will have this effect, and that the coming into being of Malaysia will not prove to be a continuing source of friction and tension in the area.

The emergence of dependent territories by a process of self-determination to the status of self-government, either as independent sovereign States or as autonomous components of larger units, has always been one of the purposes of the Charter and the objectives of the United Nations. Whatever the origins of the proposal of Malaysia may have been, it seems to me in the light of actual events, including the present exercise, that we have witnessed in Sarawak and North Borneo the same process leading to self-government. I fervently hope that the people of these territories will achieve progress and prosperity, and find their fulfilment as component States of Malaysia.

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# ANNEX 4

## Recent Philippines statements pertaining to Sipadan

**MEMORANDUM FROM THE PRESIDENT**

TO : **Secretary, Department of National Defense**
**Chief-of-Staff, Armed Forces of the Philippines**
**Commanding General, Southern Command**

DATE : **26 April 2000**

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**Please be informed that I have today directed Prof. Nur P. Misuari, Governor, Autonomous Region of Muslim Mindanao (ARMM) and Chairman, Southern Philippines Council for Peace and Development (SPCPD), to negotiate in behalf of the Government of the Philippines, for the release of nineteen (19) hostages, mostly foreign nationals, who were recently abducted in Malaysia and have now been reported as being held in Sulu and in Tawi-tawi.**

**In this connection, you are hereby directed to extend to Prof. Misuari all necessary assistance for the successful accomplishment of this mission.**

**For immediate and direct compliance.**

**JOSEPH EJERCITO ESTRADA**

[illegible] #16877

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# NEWS RELEASE

No. 4 May 4, 2000

## MALAYSIA EXPRESSES SUPPORT FOR RP EFFORTS TO RESCUE SULU HOSTAGES

A delegation of Malaysian officials relayed to President Joseph "Erap" Ejercito Estrada Wednesday night their support for the Philippine government's handling of the hostage situation in Sulu.

Press Secretary Ricardo "Dong" Puno Jr. said the delegation relayed this message after receiving a briefing from top Philippine police and military officials in Malacañang about the latest update on efforts to ensure the safe release of the Sulu hostages, which include a Filipino, 10 Malaysians, three Germans, two French nationals, two South Africans, two Finns, and one Lebanese.

The hostages were kidnapped from an island resort in Malaysia and later brought by their captors to Talipao town in Jolo, Sulu.

"The Malaysian delegation expressed their support for the steps that the Philippine government is taking to resolve the situation," Puno said at a press briefing after the meeting in Malacañang of the Cabinet Cluster E, which tackles political affairs and national security concerns.

Puno, who is also the presidential spokesman, said the Malaysian delegation will proceed to Zamboanga Thursday to meet with Governor Nur Misuari of the Autonomous Region in Muslim Mindanao (ARMM).

Misuari, according to Puno, will continue to be the chief government negotiator tasked to ensure the safe release of the hostages. Puno added that the military continues to cordon off the area in Talipao where the victims are being held.

Puno stressed anew that the negotiations concerning the release of the hostages are "basically the function of the Philippine government."

"Hopefully this can be resolved in a peaceful manner," he added.

Puno pointed out that the Estrada administration has also received several "expressions of support" from the other foreign governments whose nationals are now being held hostage in Sulu.

Just two days after the last four European hostages grabbed from Sipedan were released, the Abu Sayaf struck again in Malaysia, taking with them three Malaysians from another diving resort not far from Sipedan.

Puno earlier noted that chief government negotiator Secretary Robert Aventajado was assured by Abu Sayyaf Commander Ghalib Andang alias Commander Robot that negotiations for the two French hostages and Ullah will continue, despite the abduction of the three Malaysians.

Aventajado, according to Puno, is optimistic that the remaining hostages will be released soon.

"Secretary Aventajado is confident that this matter is going to be resolved in the next several days. We'll await that. Let's see what happens," he said.

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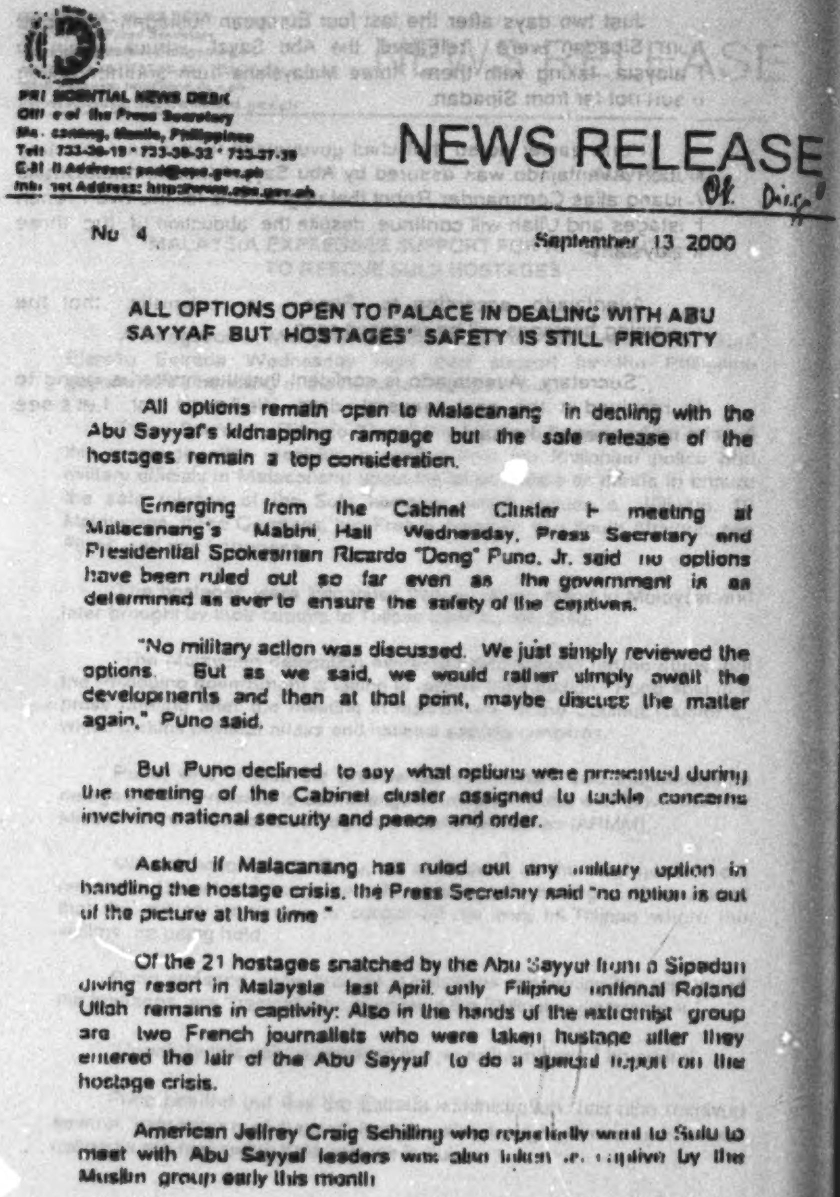

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# NEWS RELEASE

Of. Dir.

No 4

September 13 2000

## ALL OPTIONS OPEN TO PALACE IN DEALING WITH ABU SAYYAF BUT HOSTAGES' SAFETY IS STILL PRIORITY

All options remain open to Malacanang in dealing with the Abu Sayyaf's kidnapping rampage but the safe release of the hostages remain a top consideration.

Emerging from the Cabinet Cluster E meeting at Malacanang's Mabini Hall Wednesday, Press Secretary and Presidential Spokesman Ricardo "Dong" Puno, Jr. said no options have been ruled out so far even as the government is as determined as ever to ensure the safety of the captives.

"No military action was discussed. We just simply reviewed the options. But as we said, we would rather simply await the developments and then at that point, maybe discuss the matter again," Puno said.

But Puno declined to say what options were presented during the meeting of the Cabinet cluster assigned to tackle concerns involving national security and peace and order.

Asked if Malacanang has ruled out any military option in handling the hostage crisis, the Press Secretary said "no option is out of the picture at this time."

Of the 21 hostages snatched by the Abu Sayyaf from a Sipadan diving resort in Malaysia last April, only Filipino national Roland Ullah remains in captivity. Also in the hands of the extremist group are two French journalists who were taken hostage after they entered the lair of the Abu Sayyaf to do a special report on the hostage crisis.

American Jeffrey Craig Schilling who reportedly went to Sulu to meet with Abu Sayyaf leaders was also taken as captive by the Muslim group early this month

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## ANNEX 5

## Philippines Optional Clause Declaration, 23 December 1971

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## No. 11523

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### PHILIPPINES

## Declaration recognizing as compulsory the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice. Manila, 23 December 1971

*Authentic text: English.*

*Registered ex officio on 18 January 1972.*

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### PHILIPPINES

## Déclaration reconnaissant comme obligatoire la juridiction de la Cour internationale de Justice, conformément au paragraphe 2 de l'Article 36 du Statut de la Cour internationale de Justice. Manille, 23 décembre 1971

*Texte authentique : anglais.*

*Enregistrée d'office le 18 janvier 1972.*

## DECLARATION[1] BY THE PHILIPPINES RECOGNIZING AS COMPULSORY THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE, IN CONFORMITY WITH ARTICLE 36, PARAGRAPH 2, OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

I, Carlos P. Romulo, Secretary of Foreign Affairs of the Republic of the Philippines, hereby declare, under Article 36, paragraph 2, of the Statute of the International Court of Justice, that the Republic of the Philippines recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes arising hereafter concerning:

(*a*) the interpretation of a treaty;

(*b*) any question of international law;

(*c*) the existence of any fact which, if established, would constitute a breach of an international obligation;

(*d*) the nature or extent of the reparation to be made for the breach of an international obligation;

Provided, that this declaration shall not apply to any dispute

(*a*) in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement; or

(*b*) which the Republic of the Philippines considers to be essentially within its domestic jurisdiction; or

(*c*) in respect of which the other party has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purposes of such dispute; or where the acceptance of the compulsory jurisdiction was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court; or

(*d*) arising under a multilateral treaty, unless (1) all parties to the treaty are also parties to the case before the Court, or (2) the Republic of the Philippines specially agrees to jurisdiction; or

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[1] Deposited with the Secretary-General of the United Nations on 18 January 1972.

(*e*) arising out of or concerning jurisdiction or rights claimed or exercised by the Philippines—

  (i) in respect of the natural resources, including living organisms belonging to sedentary species, of the sea-bed and subsoil of the continental shelf of the Philippines, or its analogue in an archipelago, as described in Proclamation No. 370 dated 20 March 1968 of the President of the Republic of the Philippines; or

  (ii) in respect of the territory of the Republic of the Philippines, including its territorial seas and inland waters; and

Provided, further, that this declaration shall remain in force until notice is given to the Secretary-General of the United Nations of its termination.

DONE at Manila this 23rd day of December 1971.

CARLOS P. ROMULO
Secretary of Foreign Affairs

# ORAL ARGUMENTS ON THE APPLICATION FOR PERMISSION TO INTERVENE

## VERBATIM RECORDS OF THE HEARINGS

# PLAIDOIRIES RELATIVES À LA REQUÊTE À FIN D'INTERVENTION

## COMPTES RENDUS D'AUDIENCE

CR 2001/1

**International Court of Justice**

**THE HAGUE**

**Cour internationale de Justice**

**LA HAYE**

**YEAR 2001**

***Public sitting***

***held on Monday 25 June 2001, at 10 a.m., at the Peace Palace,***

***President Guillaume presiding***

***in the case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)***

***Application for permission to intervene filed by the Republic of the Philippines***

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**VERBATIM RECORD**

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**ANNÉE 2001**

***Audience publique***

***tenue le lundi 25 juin 2001, à 10 heures, au Palais de la Paix,***

***sous la présidence de M. Guillaume, président***

***en l'affaire relative à la Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)***

***Requête à fin d'intervention déposée par la République des Philippines***

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**COMPTE RENDU**

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|---|---|---|
| *Present:* | President | Guillaume |
| | Judges | Oda |
| | | Bedjaoui |
| | | Ranjeva |
| | | Fleischhauer |
| | | Koroma |
| | | Vereshchetin |
| | | Higgins |
| | | Parra-Aranguren |
| | | Kooijmans |
| | | Rezek |
| | | Al-Khasawneh |
| | | Buergenthal |
| | Judge *ad hoc* | Weeramantry |
| | | Franck |
| | Registrar | Couvreur |

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*The Government of the Republic of the Philippines is represented by:*

H. E. Mr. Eloy R. Bello III, Ambassador of the Republic of the Philippines to the Kingdom of the Netherlands,

*as Agent;*

Mr. Merlin M. Magallona, Under-Secretary of Foreign Affairs, Government of the Republic of the Philippines,

*as Co-Agent and Counsel;*

Professor W. Michael Reisman, Yale Law School,

*as Counsel and Advocate;*

Dr. Peter Payoyo, University of the Philippines,

*as Counsel;*

Mr. Alberto A. Encomienda, Secretary-General, Maritime and Ocean Affairs Center, Department of Foreign Affairs,

Mr. Alejandro B. Mosquera, Assistant Secretary, Office of Legal Affairs, Department of Foreign Affairs,

Mr. George A. Eduvala, Attaché, Embassy of the Republic of the Philippines in the Netherlands,

Mr. Eduardo M. R. Meñez, Second Secretary, Embassy of the Republic of the Philippines in the Netherlands,

Mr. Igor G. Bailen, Acting Director, Office of Legal Affairs, Department of Foreign Affairs,

*as Advisers.*

*The Government of the Republic of Indonesia is represented by:*

H. E. Dr. N. Hassan Wirajuda, Director General for Political Affairs

*as Agent;*

H. E. Mr. Abdul Irsan, Ambassador of Indonesia to the Kingdom of the Netherlands

*as Co-Agent;*

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member of the International Law Commission,

Mr. Rodman R. Bundy, Avocat à la Cour d'appel de Paris, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris

*as Counsel and Advocates;*

Mr. Alfred A. H. Soons, Professor of Public International Law, Utrecht University,

Ms Loretta Malintoppi, Avocat à la Cour d'appel de Paris, Member of the Rome Bar, Frere Cholmeley/Eversheds, Paris,

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

*as Counsel;*

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,

Mr. Donnilo Anwar, Director for Treaties and Legal Affairs, Department of Foreign Affairs,

Mr. Major General Djokomulono, Territorial Assistant to Chief of Staff for Territorial Affairs, Indonesian Armed Forces Headquarters,

Mr. Rear-Admiral Yoos F. Mamko, Intelligent Assistant to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

Mr. Eddy Pratomo, Head of Sub-Directorate for Territorial Treaties, Department of Foreign Affairs,

Mr. Abdul Kadir Jaelani, Officer, Embassy of the Republic of Indonesia, The Hague

*as Advisers.*

*The Government of Malaysia is represented by:*

H. E. Tan Sri Abdul Kadir Mohamad, Secretary General of the Ministry of Foreign Affairs,

*as Agent;*

H. E. Ms Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands,

*as Co-Agent;*

Professor Sir Elihu Lauterpacht C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*,

Professor Jean-Pierre Cot, Emeritus Professor, Université de Paris I, Advocate, Paris and Brussels Bars,

Professor James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member, International Law Commission,

Professor Nico Schrijver, Professor of International Law, Free University Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration,

*as Counsel and Advocates;*

Datuk Heliliah Yusof, Solicitor-General of Malaysia,

Mrs. Halima Hj. Nawab Khan, Acting State Attorney-General of Sabah, Malaysia,

Mr. Ahmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers, Malaysia,

*as Counsel;*

H. E. Ambassador Hussin Nayan, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

Mr. Muhamad bin Mustafa, Deputy Director-General, National Security Division, Prime Minister's Department, Malaysia,

*as Advisers;*

Mr. Zulkifli Adnan, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

Mr. Raja Aznam Nazrin, Counsellor of the Embassy of Malaysia in the Netherlands,

Mr. Nik Aziz Nik Yahya, First Secretary of the Embassy of Malaysia in the Philippines,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Division, Department of Survey and Mapping, Malaysia,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

Mr. Shaharuddin Onn, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

*as administrative staff.*

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre, conformément au paragraphe 2 de l'article 84 de son Règlement, les plaidoiries de la République des Philippines et des Parties sur la question de savoir si dans l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*, la requête à fin d'intervention déposée le 13 mars 2001 par le Gouvernement des Philippines en vertu de l'article 62 du Statut, doit être admise.

Le vice-président Jiuyong Shi et le juge Géza Herczegh, pour des raisons dont ils m'ont dûment fait part, ne peuvent être présents aujourd'hui sur le siège.

En raison de son état de santé, le juge Thomas Buergenthal se voit provisoirement imposer l'usage d'un fauteuil roulant et a dû par suite prendre place sur le siège de la Cour de manière adaptée aux circonstances.

L'instance en l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)* a été introduite par la notification à la Cour, le 2 novembre 1998, d'un compromis signé le 31 mai 1997 entre la République d'Indonésie et la Malaisie en vue de soumettre à la Cour un différend entre les deux Etats relatif à la souveraineté sur ces deux îles de la mer des Célèbes.

La Cour ne comptant pas sur le siège de juge de nationalité indonésienne ou malaisienne, les deux Parties ont exercé la faculté que leur confère l'article 31 du Statut de désigner un juge *ad hoc*. L'Indonésie avait désigné M. Mohamed Shahabuddeen. Celui-ci ayant démissionné de ses fonctions de juge *ad hoc* à la date du 20 mars 2001, elle a désigné M. Thomas Franck pour le remplacer. La Malaisie a pour sa part désigné M. Christopher Gregory Weeramantry.

L'article 20 du Statut de la Cour dispose que «*Tout membre de la Cour doit, avant d'entrer en fonction, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience.*» Cette disposition est applicable aux juges *ad hoc*, en vertu du paragraphe 6 de l'article 31 du Statut. Conformément à l'article 4 du Règlement, une telle déclaration doit être faite lors de la première séance publique à laquelle le juge concerné assiste. La présente audience étant la première en l'affaire, j'inviterai les juges Weeramantry et Franck, suivant l'ordre de préséance, à faire cette déclaration dans quelques minutes. Auparavant, je souhaiterais dire quelques mots de la carrière et des qualifications de ces deux juges.

M. Christopher Gregory Weeramantry, de nationalité sri-lankaise, est bien connu de ce prétoire. Pendant neuf années, il siégea à cette table en qualité de membre, puis de vice-président, de la Cour. Avant d'entrer en fonctions à la Cour en 1991, il avait déjà derrière lui une longue et brillante carrière frappée du sceau de la diversité. Après avoir consacré vingt-cinq années au service de la justice dans son pays d'origine en qualité d'avocat, puis de juge à la Cour suprême de Sri Lanka, M. Weeramantry avait rejoint le monde universitaire qu'il n'a jamais vraiment quitté depuis lors. En 1972, il fut nommé professeur de droit, titulaire de la chaire sir Hayden Stark[illegible] à la *Monash University* de Melbourne (Australie) et fut par la suite appelé à enseigner en qualité de professeur invité ou titulaire dans diverses universités. Après son départ de la Cour l'année dernière, M. Weeramantry est retourné au monde de l'enseignement et de la recherche. Il est l'auteur de très nombreuses publications dont d'importantes monographies. Il est en outre associé de l'Institut de droit international et membre de nombreuses autres sociétés savantes.

M. Thomas Franck, de nationalité américaine, est professeur de droit à la faculté de droit de l'Université de New York depuis 1962 et directeur du *Center for International Studies* de cette même faculté depuis 1965. Il est également un habitué de cette grande salle de Justice, ayant notamment été conseil du Gouvernement du Tchad en l'affaire du *Différend territorial (Jamahiriya arabe libyenne/Tchad)* et conseil du Gouvernement de la Bosnie-Herzégovine en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie)*. Il a aussi exercé les fonctions de conseil ou de conseiller juridique d'un certain nombre d'autres gouvernements. Il est l'auteur d'un grand nombre de publications; je mentionnerai en particulier le cours général de droit international public qu'il a donné à l'Académie de droit international de La Haye en 1993. M. Franck a par ailleurs été rédacteur en chef de l'*American Journal of International Law* et est encore membre du conseil scientifique de plusieurs revues importantes. Il est également membre de nombreuses sociétés savantes dont l'Institut de droit international.

J'inviterai maintenant MM. Weeramantry et Franck à prendre l'engagement solennel prescrit par le Statut et je demanderai à toutes les personnes présentes à l'audience de bien vouloir se lever. Monsieur Weeramantry.

M. WEERAMANTRY: «I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.»

Le PRESIDENT: Je vous remercie. Monsieur Franck.

M. FRANCK: «I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.»

Le PRESIDENT: Je vous remercie. Veuillez vous asseoir. Je prends acte des déclarations solennelles faites par MM. Weeramantry et Franck, et je les déclare dûment installés en qualité de juges *ad hoc* en l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*.

* * *

Je rappellerai maintenant que l'instance a été introduite le 2 novembre 1998 dans la notification par l'Indonésie et la Malaisie d'un compromis visant à soumettre à la Cour un différend entre les deux Etats relatif à la souveraineté sur ces deux îles. Par ordonnance en date du 10 novembre1998, la Cour a fixé au 2 novembre 1999 et au 2 mars 2000, respectivement, les dates d'expiration des délais pour le dépôt d'un mémoire et d'un contre-mémoire par chacune des Parties, compte tenu des souhaits exprimés par celles-ci dans le compromis. Les mémoires des Parties ont été déposés dans le délai ainsi fixé. Par lettre conjointe du 18 août 1999, les Parties ont demandé à la Cour de reporter au 2 juillet 2000 la date d'expiration du délai pour le dépôt de leurs contre-mémoires. Par ordonnance en date du 14 septembre 1999, la Cour a accédé à cette demande. Par lettre conjointe du 8 mai 2000, les Parties ont demandé à la Cour un nouveau report d'un mois de la date d'expiration du délai pour le dépôt de leurs contre-mémoires. Par ordonnance du 11 mai 2000, la Cour a également accédé à cette demande. Les contre-mémoires des Parties ont été déposés dans le délai ainsi prorogé. Aux termes du compromis, les deux Parties devaient présenter une réplique au plus tard quatre mois après la date à laquelle chacune aurait reçu la copie certifiée conforme du contre-mémoire de l'autre. Par lettre conjointe du 14 octobre 2000, les Parties ont prié la Cour de proroger ce délai de trois mois. Par ordonnance en date du 19 octobre 2000, le président de la Cour a fixé au 2 mars 2001 la date d'expiration du délai pour le dépôt d'une réplique par chacune des Parties. Les répliques des Parties ont été déposées dans le délai ainsi prescrit. Le compromis prévoyant la possibilité de dépôt d'une quatrième pièce de procédure par chacune des Parties, celles-ci ont, par lettre conjointe du 28 mars 2001, informé la Cour qu'elles ne souhaitaient pas produire de pièce supplémentaire. La Cour elle-même n'en a pas vu la nécessité.

Par lettre du 22 février 2001, le Gouvernement des Philippines, invoquant le paragraphe 1 de l'article 53 du Règlement, a adressé à la Cour une demande tendant à ce que lui soient communiqués des exemplaires des pièces de procédure et des documents annexés déposés par les Parties. Conformément à la disposition susmentionnée du Règlement, la Cour s'est renseignée auprès des Parties et a décidé qu'il n'était pas approprié d'accéder à la demande des Philippines dans les présentes circonstances. Cette décision a été communiquée aux Philippines, à l'Indonésie et à la Malaisie par lettres en date du 15 mars 2001.

Le 13 mars 2001, les Philippines ont déposé au Greffe de la Cour une requête à fin d'intervention dans l'affaire, en invoquant l'article 62 du Statut. Cette disposition se lit comme suit :

> «Lorsqu'un Etat estime que, dans un différend, un intérêt d'ordre juridique est pour lui en cause, il peut adresser à la Cour une requête, à fin d'intervention.
>
> La Cour décide.»

Dans leur requête à fin d'intervention, les Philippines ont précisé que celle-ci constituait une démarche distincte de leur demande de communication des pièces de procédure. Selon les Philippines, l'intérêt d'ordre juridique qui est pour elles en cause dans la présente espèce «porte uniquement et exclusivement sur les traités, les accords et autres éléments de preuve fournis par les Parties et pris en compte par la Cour qui ont une incidence directe ou indirecte sur la question du statut juridique du Bornéo septentrional». Les Philippines ont par ailleurs indiqué que l'objet de l'intervention sollicitée était entre autres de

> «préserver et sauvegarder les droits d'ordre historique et juridique du Gouvernement ... des Philippines qui découlent de la revendication de possession et de souveraineté que ledit gouvernement formule sur le territoire du Bornéo

> septentrional dans la mesure où ces droits sont ou pourraient être mis en cause par une décision de la Cour relative à la question de la souveraineté sur Pulau Ligitan et Pulau Sipadan».

Les Philippines ont en outre spécifié, dans leur requête à fin d'intervention, que celle-ci «se fonde exclusivement sur l'article 62 du Statut, qui n'exige pas un titre de compétence distinct pour donner suite à cette requête».

Conformément au paragraphe 1 de l'article 83 du Règlement de la Cour, les deux Parties à l'affaire, l'Indonésie et la Malaisie, ont été invitées à présenter, le 2 mai 2001 au plus tard, des observations écrites sur la requête à fin d'intervention; chacune d'elles a présenté de telles observations dans le délai fixé à cet effet. Ces observations ont été échangées entre les Parties et transmises aux Philippines.

Dans leurs observations écrites, tant l'Indonésie que la Malaisie ont fait objection à la requête à fin d'intervention introduite par les Philippines. Le paragraphe 2 de l'article 84 du Règlement de la Cour dispose que, s'il est fait objection à une requête à fin d'intervention, la Cour doit entendre, avant de statuer, l'Etat désireux d'intervenir ainsi que les Parties. Les présentes audiences publiques sont tenues à cette fin.

Après s'être renseignée auprès des Parties, la Cour a décidé que les observations écrites des deux Parties sur la requête à fin d'intervention, ainsi que les documents annexés auxdites observations, seraient rendus accessibles au public à l'ouverture de la présente procédure orale. En outre, ces observations écrites seront placées aujourd'hui même sur le site *Internet* de la Cour, conformément à la pratique.

Je constate la présence à l'audience des agents, conseils et avocats des deux Parties, ainsi que la présence des agents, conseils et avocats des Philippines, l'Etat qui demande à intervenir. Conformément aux accords intervenus entre les Parties et les Philippines, sur l'ordre dans lequel elles prendraient la parole au cours de la présente procédure orale, les Philippines présenteront les premières leurs plaidoiries; elles seront suivies par l'Indonésie et la Malaisie. L'audience de ce matin sera consacrée aux plaidoiries des Philippines; celle de demain matin aux plaidoiries de l'Indonésie et de la Malaisie. Un second tour de plaidoiries assez bref a été prévu pour les 28 et 29 juin. Les Philippines présenteront leur réplique orale le jeudi 28 juin, tandis que l'Indonésie et la Malaisie présenteront les leurs le vendredi 29 juin.

Et je donne à présent la parole à S. Exc. M. Eloy R. Bello III, agent des Philippines. Monsieur l'agent, vous avez la parole.

**Mr. BELLO:**

1. Mr. President, Members of the Court: to address the Court is more than a privilege. It is a great honour.

2. To the representatives of the people of the Republic of Indonesia and Malaysia, I wish them well. Among the many things that we share is a common interest in the peaceful resolution of the few disputes that divide us.

3. On 28 April 1950, both Houses of the Congress of the Government of the Republic of the Philippines adopted a concurrent resolution: "that subject to the lease rights of the British Government, the territory known as British North Borneo belongs to the heirs of the Sultanate of Sulu and falls under the ultimate sovereignty of the Republic of the Philippines". On 24 April 1962, in a rare instance of unanimity, the House of Representatives resolved "urging the President of the Philippines to take all necessary steps, consistent with international law and procedure, for the recovery of a certain portion of North Borneo".

4. In the Manila Accord of July 1963, Indonesia, Malaysia and the Philippines took note

> "of the Philippine claim and the right of the Philippines to continue to pursue it in accordance with international law and the principle of the pacific settlement of disputes. They agreed that the inclusion of North Borneo in the Federation of Malaysia would not prejudice the claim or any right thereunder."

Further, they agreed "to bring the claim to a just and expeditious solution by peaceful means, such as negotiation, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties' own choice". There were other occasions on which the Philippines tried to assert its claim, prominent among which was the negotiation held in Bangkok in 1968.

5. After Malaysia and Indonesia notified this Court of their dispute concerning sovereignty over Pulau Sipadan and Pulau Ligitan on 2 November 1998, my Government began a study which looked into the question of how that dispute could affect the national interest of the Philippines. Specifically, my Government wished to find out whether the bilateral dispute between Indonesia and Malaysia over Pulau Sipadan and Pulau Ligitan could have any repercussions on the definition of Philippine national territory and its territorial integrity. From the results of our study, we

concluded that the legal dispute over these two islands could affect our national interest, by producing possible interpretations of the treaties, agreements and other documentary evidence, on the basis of which, according to the Special Agreement between Indonesia and Malaysia, the issue of sovereignty over Pulau Ligitan and Pulau Sipadan would be determined.

6. When my Government registered its request on 22 February 2001, to be furnished pleadings and documents annexed, we were fully aware that the deadline for Indonesia and Malaysia to submit their Replies was set on 2 March 2001. Under paragraph 1 of Article 81 of the Rules of Court, an application for permission to intervene should be filed usually not later than the closure of written proceedings. Given the circumstances surrounding our request, my Government was conscious of the fact that *after* 2 March 2001, Indonesia and Malaysia might no longer consider the need to submit a final round of pleadings as contemplated in their Special Agreement. The Court then, sooner or later, would announce the formal closure of the written proceedings. Therefore, in view of what we perceived as the impending closure of the written proceedings, and without waiting for the Court's answer to our request to be furnished copies of pleadings, my Government filed the current Application for permission to intervene. I raise this technical point because Indonesia has made the argument in its observations that the Philippine Application should be dismissed as being "untimely".

7. After the Philippines filed its Application for permission to intervene on 13 March 2001, the Court on 15 March issued a response to our previously-filed letter, and denied our request, presumably on the ground that both Parties objected to the Philippine request. This denial could only strengthen my Government's hypothesis that Indonesia and Malaysia have made substantive arguments and submissions in their pleadings which, if accepted or taken for granted by the Court, could bring about grave prejudice to the outstanding territorial claim by the Philippines to territory in North Borneo, and the Philippines right and responsibility to pursue that claim by every peaceful means.

8. Earlier, I mentioned that the crux of this legal interest lies in the interpretation of certain treaties and agreements submitted by Indonesia and Malaysia to base their respective claims to sovereignty over the two islands, in the course of which the Philippine territorial claim to North Borneo could be prejudiced. Let me state clearly and unequivocally that unless my Government

intervenes in the present proceedings between Indonesia and Malaysia, our right to assert, defend and peacefully settle the Philippines territorial claim to North Borneo could be unjustly affected.

9. Mr. President, Members of the Court, Professor Michael Reisman will follow with arguments that will refute the specific objections raised by Indonesia and Malaysia in their observations on the Philippine Application for permission to intervene. Professor Reisman will explain why it is imperative for the Court to grant the Philippine Application to intervene. Professor Merlin Magallona, who will follow Professor Reisman, will outline to the Court the particular treaties and other agreements that may have a direct bearing on the issue of sovereignty over Pulau Ligitan and Pulau Sipadan but also on the legal status of North Borneo — the interest of a legal nature which the Philippines believes may be affected by the present proceedings. The Philippines does not, however, intend in these proceedings to argue its cause, nor seek an endorsement of its cause, on the North Borneo issue.

10. For the convenience of the Bench, the judges' folders include only materials referred to in the Malaysian observations of 2 May 2001, to which our counsel will refer in the course of their presentations.

11. Thank you, Mr. President and Members of the Court. Now I request the Court to call on Professor Michael Reisman to address the Court.

The PRESIDENT: Thank you, Mr. Ambassador. I give the floor now to Mr. Michael Reisman.

Mr. REISMAN:

1. Thank you very much Mr. President. Mr. President, Members of the Court. I am honoured to appear before this distinguished Court on behalf of the Republic of the Philippines.

2. This is an unusual intervention case: the legal issue, or legal interest is not graphic or manifest on the face of the record, as in previous interventions, but contingent and speculative for the intervening State, because it has not been given the documents. As Ambassador Bello has said, our interest is not the islands that are in dispute before you, but interpretations of certain treaties and agreements and certain facts which one party may rely upon to establish its case, because those treaties may be central to the Philippine claim to territory in North Borneo. Though that claim is

not before the Court and need not, indeed may not, in the absence of agreement by Malaysia, be decided in this procedure, we must explain enough of it so that the Court can appreciate the relation of the treaties, agreements and facts in the case before it to the claim of the Philippines and, as a result, our interest of a legal nature. But we must not explain "too much", for the Court, in the present procedure, is not seised with our claim and we do not wish to be accused of trying to present our case. Yet, because we have been denied access to the documents, we cannot say with any certainty whether and which treaties, agreements and facts are in issue. So we are compelled to present our position more generally than any jurist would like, lest matters of concern to the Philippines not be drawn to the Court's attention.

3. We think that this is a case of first impression for three reasons:

— first, because of the character of the *interest* of a legal nature that we consider is different from previous interventions;

— second, because of the character of the *case* in which this interest is engaged and that is different from the precedents; and

— third, because the Philippines has not been given access to the documents in the case and, as a result and in the special circumstances of the case, labours under a handicap that was not present in previous cases.

**Philippine duties under Article 62**

4. Article 62 is referred to as an aspect of "incidental jurisdiction". The adjective, "incidental", inevitably carries an implication that a procedure of this sort is, somehow or other marginal or peripheral and of incidental importance. On the contrary. Article 62 is as important a tool and protection for the Court in the discharge of its functions, as it is for a State that believes that a pending case between other States may affect its own interests. The international human rights movement has happily made many legal procedures into inalienable human rights. This important new conception of procedures — as guaranteed "rights" or "entitlements" — may obscure the other, much older and continuing function of procedural arrangements: they are the tried and tested means for ensuring that a decision-maker arrives efficiently and economically at the truth. And Article 62, we believe, incorporates both of these conceptions and functions.

5. When two States refer a case to the International Court by special agreement, they can define the issues and delimit the parameters of their joint submission. They may even specify the rules of law to be applied. In the practice of "adjudication on an agreed basis", the parties may establish at the outset that the subject of dispute, let us say sovereignty over an island or a group of islands, shall belong to one or the other but not to any third State. They may structure their adjudications so that neither of them has to prove that it has met the international standard of effective occupation; title will be granted to whichever has the comparatively stronger of the two claims, even though it may not meet the international standard. When two States adjudicate on this basis, they may, in good faith, believe that the dispute is exclusive to them; and obviously international law and jurisdictional theory has to presume that. Yet their case may implicate — and possibly in important ways — the interests of another State.

6. If two States in a bilateral dispute had elected to submit to arbitration rather than to the Court, the rest of the world community would not have known about the procedure. In particular, a State which — if it had known of the arbitration — might have considered that some possible outcomes of this ostensibly "private" dispute could affect one of its own interests would have no recourse. But if two States had elected to submit their dispute to the International Court, a third State with a hypothetical interest would have the advantage of knowing of the submission, because applications to this great Court are public information. Ironically and in spite of this advantage, the dilemma of the third State will now be even more acute, thanks to the very stature of the Court. Theoretically of course, a judgment of the Court, like an arbitral award, has no binding force except between the parties and with respect to that particular case. But despite Article 59, the International Court, as the principal judicial organ of the United Nations, issues decisions which are, by their very provenance and nature, expressive of international law and have a profound influence on its development. And this is especially the case with treaties concerning title to territory. As the *Eritrea/Yemen* Tribunal said: "this special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*"[1].

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[1] The Government of the State of Eritrea and the Government of the Republic of Yemen, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute) at para. 153.

7. The acute dilemma of the third State in the example described a moment ago is shared, paradoxically, by the Court itself. While parties in a case before the Court may argue the law incompletely or fecklessly, the Court is entitled, under the general principle of *curia novit lex*, to rely upon its own knowledge of the law and, if it deems appropriate, to apply rules and principles which the parties may not have argued. But, except for the most notorious facts, of which a court may take "judicial notice", the way the International Court gains *factual* information is through the parties: the facts are adduced by the parties and then tested in the crucible of the adversarial process. Thus, if a bilateral dispute before the Court contains the possibility of affecting or even prejudicing the interests of a third State, the Court is in danger — and I emphasize the word danger — of rendering a decision without knowing those interests. The Court's decision could be based on an incomplete version of the facts on only some of the issues, on only some of the possible legal interpretations of the instruments invoked and could adversely affect the interests of a legal nature of another State.

8. Article 62 of the Statute gives tools for an economic solution to this problem which is shared by the third party and the Court. It provides that should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. If the Court grants the application to intervene, the intervening State, according to Rule 85 is supplied with the written submissions of the parties and is itself entitled to submit a written statement to which the parties in the case before the Court may furnish their own written observations. The intervening State may also submit its observations in oral proceedings.

9. Thanks to this exceptional procedure, a party with an interest, which might be affected by a possible decision outcome, may bring it to the attention of the Court. This is important for the State, but it is at least as important for the Court. As Professor Damrosch has written:

> "the Court can only benefit from hearing the views of other parties with a stake in the outcome. No matter how careful the Court may think it is being about drafting an order to protect their interests, there is no substitute for hearing their views directly."[3]

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[3] Damrosch, *Multilateral Disputes* in "The International Court of Justice at a Crossroads" (Damrosch, ed.) at pp. 376, 387.

10. Mr. President, Members of the Court: perfection is a property of divinity. No human creation is flawless and Article 62, for all the genius of the Statute, is a human creation. It usually works well, but it can sometimes impose a very severe and potentially paralysing burden on a State that considers it has an interest which may be affected. This burden manifests itself in circumstances in which the third State has reason to believe, but cannot confirm that its interest of a legal nature may be affected by a possible decision.

11. In circumstances in which a case is initiated by special agreement, the third State is, at least, on notice that a matter in which it believes it has a legal interest could be before the Court. For some cases, the publication of that special agreement, in and of itself, is enough to convince the third State that its interest may be affected. Think of the generic maritime boundary dispute which has often raised Article 62 demands. States A and B, by special agreement, petition the Court to delimit a comprehensive boundary. Since the Court has elaborated the rules of maritime boundary delimitation under the rubric of "equitable principles," a third State's legal advisers can readily determine where prospective delimitations may affect the third State's interest of a legal nature. In the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court itself warned that a subsequent judgment could affect "rights and interests" of specified third States[3].

12. But when the possibility of a decision affecting an interest of a third State is not certain and not graphic and is contingent on further information and specifications, the mere publication of the special agreement may not provide sufficient information. And now the third State finds itself in that uneasy condition that Durkheim called "anomie". The third State wonders: an interest of a legal nature which is obviously important *may* be implicated in the pending case, but has it actually been raised? Do the submissions of the parties require the Court to consider, as one option, a decision that could affect the third State's interest? These questions cannot be answered by studying the special agreement or by looking at a maritime chart. The third State must see the written submissions and documents because only they will show whether one of its interests is actually implicated.

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[3] Judgment of 11 June 1998, para. 116.

13. Under the régime of the Court, the documents of the written proceedings are treated as confidential until a case is terminated. This confidentiality may be important to the State submitting to the Court's jurisdiction and the Court takes this matter very seriously[4]. But there may be circumstances, for example arising under Article 62, when a third State will need access to the pleadings and documents to confirm that its interest may be implicated and to prepare itself to explain why. So, how then is the important policy of confidentiality of written pleadings to be accommodated with Article 62?

14. The Statute is only implicit on this, but Article 53, paragraph 1, of the Rules which is an institutional decision of the Court does give us guidance: the Court decides, after ascertaining the views of the parties, that copies and pleadings and documents should be made available to a State entitled to appear before it, and requesting them. Now, I don't know on what basis the Court decides whether or not to accede to a request under Rule 53 because the Court doesn't publish judgments on this. Rosenne writes: "The Court has never made the material available to a State under paragraph 1 of Rule 53 if one of the parties has objected."[5]

15. So, consider, again, the situation of a third State that has read the special agreement by which two other States have submitted their dispute to the Court. Without written submissions, the third State cannot determine with probability — as it might in a maritime boundary delimitation — that an interest may be affected by a decision of the Court. The third State applies to the Court under Article 53 of the Rules. The Court ascertains the views of the parties. One (or both) objects and the Court decides not to make the material available to the third State.

16. Mr. President, Members of the Court, this scenario would put the third State in a very difficult situation. Rosenne writes:

> "This has worked particular hardship — possibly even amounting to a denial of justice — in the case of a State requesting copies of the written pleadings in order to be able to formulate and plead a request for permission to intervene in the case on the basis of Article 62 . . ., that it has an interest of a legal nature which may be affected by the decision in the case."[6]

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[4] Indeed, in *Corfu Channel* and *Gulf of Maine*, the Court insisted that even experts it appointed had to treat the documents made available to them as strictly confidential.

[5] III Rosenne, p. 1289. "Whenever one of the parties withheld its consent," Rosenne adds, "the Court has refrained from making the pleadings available to a requesting State." *Ibid.*

[6] *Ibid.*

The Court will recall that in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Application to Intervene)*, the Chamber spelled out the necessary criteria for permission to intervene. And they were essentially to identify and to show the legal interest: "to identify" and "to show". But how can the State seeking to intervene identify the interest if it is prevented from seeing the documents? How can it demonstrate convincingly what it asserts if the other States do not allow it to see what they are arguing? A State concerned about the possible effect of a maritime boundary can look at a map. But a State with other types of interests raised by other types of cases cannot.

17. So, Rosenne is justified in using the very strong words "denial of justice". There is something offensive — even absurd — about a procedure in which a third State, seeking to exercise its option granted under the Statute, confronts one or both of the other litigants who say: "We have the documents. If you can guess what's in them, you can try to persuade the Court and then be permitted to intervene. If you guess wrong, you lose. And in oral argument, we will tell you whether or not you have guessed correctly."

18. That type of procedure is not due process. It would be a denial of justice. And in circumstances in which one interpretation of legal rules would work a denial of justice, courts try to avoid that interpretation or mitigate its effects by shifting burden of proof or adopting certain presumptions.

19. In the case before the Court, the Special Agreement of Indonesia and Malaysia requests the Court to decide "on the basis of treaties, agreements and any other evidence" to be furnished by the Parties. The Department of Foreign Affairs of the Government of the Philippines had to ask itself whether some or all of the treaties and agreements which were referred to in the Special Agreement might also be related to the claim to North Borneo, such that an interpretation by the Court could affect its interest. The Philippines could not usefully request access to the written submissions until most of them had been submitted to the Court. On 22 February, after two rounds of the written submissions had been completed but before the closure of that phase, the Philippines requested the Court to furnish it with the pleadings and documents that had been submitted, and reiterated its request on 9 March. Both Parties objected. So we are here, this morning, in a procedure in which Malaysia and Indonesia have the papers in the case and will be referring to

them, while we do not. And we have the burden of proof to show that a Philippine interest of a legal nature may be affected by the Parties' submissions.

20. I should like, Mr. President, Members of the Court, to review briefly the objections that were expressed in the observations of Malaysia and Indonesia.

### MALAYSIA'S OBJECTIONS

### The relevance of the 1885 Protocol

21. In paragraph 2, Malaysia acknowledges that the interpretation of Article III of the Protocol of 1885 is critical to the construction of the 1891 Anglo-Dutch Convention, which is, we surmise, central to Indonesia's claim. As Professor Magallona will show, the Philippines considers the interpretation of both of these instruments extremely important to its claim to North Borneo, in particular, the 1885 Protocol. We do not know what interpretations one or both of the Parties have put on these instruments because we have not seen the documents.

### The Philippine claim to North Borneo

22. Section A of Malaysia's observations purports to be a refutation of the Philippines claim to North Borneo. We believe that this section is based on a number of misapprehensions both of the meaning of Article 62 and the reasons for and the bases and implications of the Philippines Application to intervene. Malaysia purports to engage in a detailed refutation of the Philippines claim to North Borneo. That is not the subject of an Article 62 application nor would it seem that the Court has personal or material jurisdiction over such an issue. The Philippines and Malaysia have not agreed to submit the issue of sovereignty over North Borneo to the Court (though it is worth mentioning that the Philippines proposed precisely that submission, first to the United Kingdom when it controlled North Borneo and then to Malaysia, after independence). Article 62 is not a mode of *forum prorogatum*, by which the intervening State forces other States already involved in an adjudication to accept jurisdiction over a matter they are not litigating because of the interest which the intervener considers to be incidentally implicated in the case. The contingency for the application of Article 62 is the subjective appreciation of the intervening State that it has an interest. "Should a State consider . . ." *«Lorsqu'un Etat estime . . .»* In the future, Malaysia and the Philippines could agree to submit the issue of sovereignty over North Borneo to the Court for a

final decision. They have not now. The purpose of an Article 62 intervention in this case is to ensure that the Court, not having been informed by the Parties to the Special Agreement of the Philippines interest, not interpret treaties relevant to that interest that have been invoked in the case in ways that could be prejudicial to the interest of the Philippines.

23. But having explained why we think the issue of jurisdiction precludes the kind of considerations that Malaysia is developing in its observations, I would like to comment briefly on those observations because we feel that they are profoundly incorrect. Paragraph 6 of Malaysia's observations raises the central issue in dispute between the Philippines and Malaysia with respect to the territories in North Borneo. Malaysia states that "the State of Sabah has been under effective control of Malaysia and its predecessors in title since the late nineteenth century"[7]. The words "effective control" here mix law and fact. The Philippines submits and the evidence it can adduce, if given the opportunity, will confirm, that from 1878 until 1946, the British North Borneo Company and its predecessors had a *lease* over a large area of North Borneo from the Sultan of Sulu. *During all of this period, the United Kingdom recognized and insisted on the* de jure *sovereignty of the Sultanate.* The Sultan's lease was not a "cession" to a private entity, which would not have been possible under international law of the time anyway. The character of the relationship was one of lease rather than ownership or "sovereignty", if one can even use that term in this context. Its character was confirmed in diplomatic correspondence and annual lease payments were made.

24. Now if Malaysia is using the words "effective control" to mean that a lessee has effective control of the property leased, then the Philippines has no argument on the point. But if Malaysia means that a lessee gains ownership or a concessionaire gains sovereignty because of the effective control the lease or concession allows, then Malaysia has in mind a legal system utterly different from any we know of. We do not contest that the lessee, the British North Borneo Company, did *purport* to transfer title to the United Kingdom in 1946, perhaps coincidentally days after the independence of the Philippines. Nor do we contest that, decades later, the United Kingdom *purported* to transfer its rights in North Borneo to the new State of Malaysia. But the British North

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[7] Malaysian observations, para. 6.

Borneo Company could not grant more than it had and the United Kingdom could not receive more than it had, nor could the United Kingdom then increase by some legal alchemy what it had received and transfer something bigger to Malaysia. The *Digest* codified common sense when it decreed, almost 2,000 years ago: *Nemo plus juris ad alium transferre potest quam ipse habet*[8]. No one can transfer more rights to another than he himself has. In so far as any treaty or agreement that Malaysia is relying on in the present case to sustain its claim to Ligitan and Sipadan depends on the interpretation that lodges international title to North Borneo in the British North Borneo Company, that interpretation adversely affects an interest of a legal nature which the Philippines considers that it has.

25. Malaysia argues that the Philippines never presented its claim to the British North Borneo Company, which of course terminated in 1946. But why would either the Philippines or the United States, from 1898 to 1946, bring a claim if the lessee was in possession of the leasehold and making payments?

26. After 1946, Malaysia contends that the Philippines did not pursue its claim. That is a factual assertion, which is not correct, as Professor Magallona will demonstrate. As for the contention that the Philippines surrendered its claim, an understanding of the diplomatic history, the actual documents and the constitutional procedures of the Philippines will demonstrate that that is not correct. And as for the bald and unsupported claim that the cession by the heirs of the Sultan of Sulu to the Philippines in 1962 was "worthless," the Philippines rejects the contention. If any putative legal act in these events is "worthless," it is the effort to transfer a lease into property.

27. Malaysia, citing to details in its Memorial, which the Philippines has not seen, makes assertions about the status of Sulu under the period of the Spanish and then United States control of the Philippines, which appear, on the basis of the very brief glimpse we can gain through the observations, to be incorrect. Malaysia purports to interpret the 1885 Spanish Protocol as a renunciation over North Borneo. In our view, as Professor Magallona will explain, this is a serious misinterpretation of the scope of the Protocol with major impacts on the Philippine interests.

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[8] *Digest*, 50, 17, 54.

28. Malaysia states that the islands of Ligitan and Sipadan were not covered by the grant of 1878, so that "[s]omeone claiming a right of reversion to territory covered by that grant would not be entitled to the two islands". We do not take issue with that contention. This is not a Philippine claim for the islands, it is concerned with treaties whose interpretation in that dispute could prejudice our claim to North Borneo.

### Malaysia's objections to the Philippines interest of a legal nature

29. In section B of Malaysia's objection, Malaysia confuses the question of the interest and the probative standard involved. Article 62 does not say that the intervening State must have a "legal interest" or "lawful interest" or "substantial interest". All of those determinations presuppose a jurisdiction *ratione materiae* and *ratione personae* which Article 62 does not require and the Court does not have. Even if the Court interpreted the actions of the intervening State as an invitation to *prorogatum* jurisdiction, the Court would not have jurisdiction, for Malaysia and Indonesia have not agreed to it. The threshold for the invocation of Article 62 is, as a result, a *subjective* standard: the State requesting permission to intervene must "consider" that it has an interest. As I will explain in a moment, the concern of the Court, in exercising its power here, is ultimately not to decide the validity or legality of the claim, which it cannot, but whether the intervention would assist the Court in understanding the implications for a third State of certain possible decisions it might take in the pending case. For the Court to decide this matter, the State requesting permission to intervene must identify the interest in question and relate it to the case at bar.

30. The language of Article 62 is carefully drafted and speaks of an "interest of a legal nature". The reference to legal nature, *ordre juridique*, relates to whether the Court is capable of entertaining the issue. Many interests that States may claim need not be "legal" and fall within Article 36, paragraph 2, of the Statute, within the material jurisdiction of the Court. So the words "of a legal nature" establish that the intervening State must demonstrate that these are interests of a legal nature that should prevail. Now, this does not require the intervening State to show that its legal interests are correct or that they will actually prevail in a legal encounter. Obviously, the State requesting permission to intervene believes that its interests will prevail and, obviously, the State

that is objecting believes that those interests will not. We submit that all that the intervening State must demonstrate, at the threshold, is that the interest is one "of a legal nature". In the *Land, Island and Maritime Frontier Dispute* case which I referred to earlier, the Chamber said

> "What needs to be shown by a State seeking permission to intervene can only be judged *in concreto* and in relation to all the circumstances of a particular case. It is for the State seeking to intervene to identify the interest of a legal nature . . ., and to show in what way that interest may be affected . . ."

31. The criteria are not to *prove* a legal or lawful interest, but to "identify the interest of a legal nature" and "to show in what way [it] may be affected". The interest of a legal nature which the Philippines believes is implicated is the interpretation of treaties which may have to be interpreted by the Court.

32. Malaysia states that the Philippine Application "does not have any relation to the question of sovereignty over Sipadan and Ligitan" (paragraph 23). Indeed.

33. Malaysia criticizes the Philippines for not being more precise. But, if I may revert to the example, we are faced with the litigant who clutches all the documents and says "guess them, if you can", and then criticizes the other party for not being precise about them.

34. Even on its own terms, however, Malaysia's objection is not well founded, for Article 62 clearly allows the subjective appreciation of the intervening State to be the contingency and it allows that appreciation to be in the realm of possibility rather than certainty: "an interest . . . which *may* be affected . . .". Nor is Malaysia correct in asserting, in paragraph 30, that the Philippines "is trying, by way of Article 62 to put before the Court a completely different dispute, which raises against Malaysia the issue of sovereignty over the whole of Sabah and its people". Not only is the Philippines not trying to put its territorial claim to North Borneo before the Court, it is trying to ensure that Malaysia does not surreptitiously do so!

35. Malaysia avers "If [the Philippines] has a legal interest, it must be to support Malaysia's claim. Yet its intervention is obviously hostile to Malaysia." With respect, we do not understand what Malaysia means here. Earlier in its objection Malaysia had said that the treaties and agreements that are of concern to the Philippines do not concern Sipadan and Ligitan. *If* that is so, then how can the request to intervene be viewed as hostile to Malaysia?

36. The Philippines also admits to confusion as to Malaysia's assertion that "a third State should not be permitted to intervene, when its own legal interest can be to support the legal position of a party which rejects its intervention". Since we have not seen the documents, we just do not understand what Malaysia is talking about.

The PRESIDENT: Professor Reisman, may I interrupt you one moment to ask you to speak a little more slowly.

Mr. REISMAN: Je m'excuse, Monsieur le Président, of course. Advocates tend, Mr. President, to become more and more passionate as they argue their case. I apologise.

Since the Philippines has not been given access to the documents, we simply do not understand what the criticism of Malaysia is here.

37. Malaysia also argues that "to accept the intervention will be seen as lending credibility to a much broader (and indefensible) claim to the State of Sabah". This is, again, a misunderstanding of Article 62. When a State intervenes, it does not put into issue and subject to the jurisdiction of the Court its interest of a legal nature. Rather, it informs the Court of that interest and its possible implication in the Court's treatment of the case, such that the Court may be aware of the matter and may take it into account in its own decision.

38. Malaysia also alleges that "if the Republic of the Philippines wishes to inform the Court, the mere fact of its Application sufficiently does so". We are grateful to the Court for this opportunity to explain the reasons for our request to intervene. But as the Court will appreciate, as long as we do not have access to the submissions of the Parties and don't know their contents, we can not really explain what our interest is. This is, as I said earlier, not a maritime boundary case where we look at a map, project an equidistant line and see that there are consequences for a third State. When we have the information, we will be able to make an assessment of what our interests are and then our response may be very short, depending on the interests or more extensive.

### INDONESIAN OBJECTIONS

39. I should briefly like to comment on Indonesia's objections.

### Objection with respect to timeliness

40. Indonesia's first objection has to do with timeliness. The short answer is that we are not out of time; we did not violate a deadline in the submission. And Indonesia, I think, understands this, which is why it does not use the word "deadline" but rather the softer and vaguer concept of "timeliness".

41. Timeliness involves a prudential judgment that relates the moment when a legal actor elects to exercise an option and the costs of that particular moment to the process of justice. Certainly, if a State voluntarily withheld its application for permission to intervene until a moment when its request would disrupt the proceedings or reduce the efficiency with which they would otherwise have been conducted, there would be good grounds for objection; and certainly, the burden would shift to the other State. In the *El Salvador/Honduras* case, for example, Nicaragua requested permission to intervene in 1989 and acknowledged that " . . . a favourable response would require the reformation of the Chamber and a re-ordering of the written proceedings". That was two years after the initial Order by the Chamber. The Philippines asks for no such radical adjustments, but only for the opportunity to see the written submissions and, if necessary, to inform the Court of its own interests of a legal nature.

42. As a practical matter, Mr. President, Members of the Court, the Philippines procedure for requesting initially the documents and then the right to intervene could not have been done other than it was. It was necessary to wait until the documents had been submitted by the Parties. There is no point to asking for documents before they are in. When it was clear that that was rejected, the Philippines only at that point asked for right of intervention.

### The objection based on the lack of Philippine concern over the islands in dispute

43. The principal substantive objection of the Indonesian observation has to do with the question of whether the Philippines interest of a legal nature is one which may be affected by a decision of the Court in the instant case. Indonesia correctly observes that the Philippines is not interested in the outcome of Ligitan and Sipadan, and indeed quote a diplomatic note from the Philippines to Indonesia on 5 April 2001. But the inference that Indonesia draws from this note, we believe, is incorrect. Indonesia says: "It therefore follows that the Philippines has expressly disavowed any interest of a legal nature in the actual subject-matter of the dispute currently

pending between Indonesia and Malaysia.[9] The purpose of an intervention under Article 62 is not to involve oneself in that case, but to insure that interpretations of legal instruments in that case do not compromise a legal interest which may be implicated.

44. Indonesia states that "the desire of the Philippines to submit its views on various unspecified 'treaties, agreements and other evidence furnished by the Parties' is abstract and vague"[10]. The words "treaties, agreements and other evidence" of course come directly from the Special Agreement of which Indonesia is one of the authors and it's quite clear that this is all that the Philippines has to deal with since it has not been permitted to see the documents in the case. We fail to see how Indonesia can seriously contend that we should be denied permission to intervene because we have not specified or focused upon or discussed documents that have been denied us.

### Objections with respect to supporting documents

45. Finally, Indonesia objects to the fact that the Philippines did not attach a list of supporting documents. A number of comments: first, that does not go to the question of the admissibility of the Application, but rather to the proof.

46. And here, the Court will, I hope, appreciate, the "catch 22" situation that the Philippines found itself in. Without knowing the documents, having been denied by both Parties access to them, we had two options:

— one was to try to document and argue the entire case for North Borneo, which would be impermissible and would be an affront to the Court, and would, we believe, properly be rejected by the Court; or

— to decide not to attach documents, since we could not know which ones would be relevant to the pending case. And we knew that if we elected to do this, one of the Parties, as Indonesia did, would then complain that we had not attached documents.

47. Mr. President, Members of the Court, the Philippine request for permission to intervene in this case is unique and one of first impression because of the nature of the case, the interests of a

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[9] Indonesian observations at para. 14.

[10] *Ibid.*

legal nature and because of the indispensability of the documents which were denied. Accordingly, we ask for the remedy in Article 85, paragraph 1, that "the intervening State shall be supplied with copies of the pleadings and documents annexed and shall be entitled to submit a written statement within a time-limit to be fixed by the Court"; and the remedy of paragraph 3: that "[t]he intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention". If our examination of the documents dispels the concerns that have been raised by the Special Agreement and several paragraphs in the Malaysian observations, the Philippines will inform the Court of that fact and will not exercise either of the remedies made available to it.

48. Mr. President, Members of the Court, I thank you for your attention. Unless the Court now wishes to recess, I would ask, Mr. President, that the Court call upon my colleague, Professor Merlin Magallona, to address it.

The PRESIDENT: Thank you very much, Prof. Reisman. La Cour va suspendre sa séance pour un quart d'heure. Je vous remercie.

*L'audience est suspendue de 11 h 10 à 11 h 30*

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise, et je donne maintenant la parole au nom de la République des Philippines au professeur Merlin M. Magallona, conseil et conseil. Monsieur le professeur, vous avez la parole.

Mr. MAGALLONA:

1. Mr. President, Members of the Court: some years ago in the case concerning *Legality of the Threat or Use of Nuclear Weapons*, I had the rare privilege of representing the Republic of the Philippines in the landmark advisory proceedings in the history of this great tribunal. Indeed, I count that experience among the most memorable professional events in my career. I am deeply honoured to have been given the opportunity by my Government to have returned to this Great Hall of Justice, this time on a matter of utmost concern and anxiety to my country from the time it regained independence in 1946. I refer to the claim of Philippine sovereignty to territories in North Borneo.

2. As Ambassador Bello, our Agent has explained, my Government has requested permission to intervene in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan* between Indonesia and Malaysia because my Government considers that it has an interest of a legal nature which may be affected by the decision in the case. Professor Reisman has presented our understanding of the specific requirements of Article 62 of the Statute of this Court. He and Ambassador Bello have explained the difficulties we have encountered in focusing on the issues raised by Indonesia and Malaysia with precision, owing to the fact that we have not given access to the written submissions in this court proceeding. My task is to explain the background and history of the interest that has brought us to this Court today and to relate it, as best I can, to what we infer, with considerably more confidence in the light of the observations of Malaysia of 2 May 2001.

3. I shall focus on the relevant treaties, agreements and other documents which, we have strong reason to believe, are being applied to the determination of the issue of sovereignty over Pulau Ligitan and Pulau Sipadan and which also relate to the Philippine territorial claim to North Borneo.

4. Before I embark on this task, however, I must describe very briefly the Philippine claim to certain territory in North Borneo. May I state outright that my purpose in doing so is NOT to present the Philippine claim as such. My purpose is simply to inform the Court that there is a territorial and historical claim in North Borneo for which the Philippines considers that it has prima facie a valid and well-founded legal argument. Establishing this argument prima facie should then allow the Court to appreciate the Philippines "interest of a legal nature" which could be affected by the Court's decision in the case between Malaysia and Indonesia. This brief preliminary exposition is called for as Malaysia, in its observations, has contended that the Philippines should be denied the right to intervene because its territorial claim to Borneo is indefensible and unfounded. May I outline some points on the Philippine claim to North Borneo?

### THE PHILIPPINE CLAIM TO NORTH BORNEO

5. The definition of Philippine territory, or what is comprised in the Philippine national territory, has always been embodied in the Philippine Constitution. The Constitution of 1973, promulgated during the presidency of Ferdinand Marcos, includes in the Philippine territory, "all

the other territories over which the Philippines has a historic right or legal title"[11]. The proviso on "historic right or legal title" has a clear and well-established meaning within the Philippine polity. By this proviso, the framers of the Constitution envisaged the historic rights or legal title of the Philippines to, among others, a portion of the territory of North Borneo.

6. The present Constitution, adopted in 1987 during the administration of President Corazon Aquino, defines national territory as including, "all other territories over which the Philippines has sovereignty or jurisdiction". It has been settled that this constitutional provision is to be read in relation to Republic Act No. 5446, which amends the Baseline Law of 1961. Section 3 of Republic Act 5446[12], reads:

> "The definition of the baselines of the territorial sea of the Philippine Archipelago . . . is without prejudice to the delineation of the baselines of the territorial sea around the territory of Sabah situated in North Borneo over which the Philippines has acquired dominion and sovereignty."

This law, it must be noted, came in the wake of bilateral talks between Malaysia and the Philippines in June-July 1968 in Bangkok. The purpose of those bilateral talks, as the historical record will confirm, was for the two countries to settle once and for all their dispute involving territories in North Borneo. Unfortunately, those bilateral talks did not succeed in producing a solution to the dispute. Parenthetically, I should add that it is was during these 1968 talks when the Philippines formally offered to Malaysia to bring the North Borneo dispute to the International Court of Justice for final resolution. But Malaysia refused the offer.

7. The 1968 Malaysia-Philippine discussions on North Borneo were set against the background of normalized official relations between the two countries which were established in 1966. In the Exchange of Notes between Malaysia and the Philippines on the subject of North Borneo which was effected on 7 February 1966, the day normal bilateral relations between the two countries were formalized, the Malaysian Ministry of External Affairs clearly and unequivocally acknowledged the Philippine claim to North Borneo[13] in the following language:

> "In view of their mutual desire to strengthen brotherly relations and to establish closer regional cooperation, the Government of Malaysia hereby puts on record that it

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[11] See Article I, Philippine Constitution, 1973 and 1987.

[12] Entitled *An Act to Amend Section One of Republic Act 3046, Entitled "An Act to Define the Baselines of the Territorial Sea of the Philippines"*, 1968.

[13] Malaysia Note No. BY 6/66, 7 February 1966.

> has never moved away from the Manila Accord of July 31, 1963 and the Joint Statement accompanying it and reiterates its assurance that it will abide by these agreements, particularly paragraph 12 of said Manila Accord and paragraph 8 of the Joint Statement."

8. The Manila Accord of 31 July 1963 is an historic agreement among Indonesia, Malaysia and the Philippines, signed by the Presidents of Indonesia and the Philippines and the Prime Minister of the Federation of Malaya. Paragraph 12 of the Manila Accord and paragraph 8 of the Joint Statement accompanying the Manila Accord acknowledged (1) the Philippine claim to North Borneo, and (2) the dispute between Malaysia and the Philippines that has been occasioned by this claim. The Manila Accord provides:

> "The Philippines made it clear that its position on the inclusion of North Borneo in the Federation of Malaysia is subject to the final outcome of the Philippine claim to North Borneo. The Ministers took note of the Philippine claim and the right of the Philippines to continue to pursue it in accordance with international law and the principle of the pacific settlement of disputes. They agreed that the inclusion of North Borneo in the Federation of Malaysia would not prejudice either the claim or any right thereunder. Moreover, in the context of their close association, the three countries agreed to exert their best endeavours to bring the claim to a just and expeditious resolution by peaceful means, such as negotiation, conciliation, arbitration, or judicial settlement as well as other peaceful means of the parties' own choice in conformity with the Charter of the United Nations and the Bandung Declaration."

In a similar vein, the relevant part of the Joint Statement reads:

> "The three Heads of Government take cognizance of the position regarding the Philippine claim to Sabah (North Borneo) after the establishment of the Federation of Malaysia as provided under paragraph 12 of the Manila Accord, that is, the inclusion of Sabah (North Borneo) in the Federation of Malaysia does not prejudice either claim or any right thereunder."

9. Thus, Indonesia, Malaysia and the Philippines have acknowledged that there is a Philippine claim to North Borneo. The three countries further acknowledged that there are also rights proceeding from, or arising out of, this claim. To the extent that this Philippine claim to North Borneo and any right thereunder inform and define the Philippine "interest of a legal nature" which my Government seeks to advance in these intervention proceedings, we submit that Indonesia and Malaysia cannot now assert nor argue that the Philippines has no claim to North Borneo and/or procedural right whatsoever flowing from that claim. This is not to say that Indonesia and Malaysia have acknowledged that we are correct, but that we have a claim at the international level.

## THE ORIGINS OF THE CURRENT INTERNATIONAL DISPUTE

10. *Mr. President, Members of the Court,* may I now outline the origins of the current international dispute. I now turn to the emergence of the Philippine "claim" to North Borneo, and what it consists of by way of legal propositions and arguments.

11. The Philippine claim to North Borneo, if I may invite the Court's attention further back in history, was officially invoked against Great Britain in 1962[14], in response to a Note addressed to the Philippine Government dated 25 May 1962. In this British Note, it was stated that:

> "Her Majesty's Government are convinced that the Crown is entitled to and enjoys sovereignty over North Borneo and that no valid claim to such sovereignty could lie from any other quarter . . . Her Majesty's Government would be bound to resist any claim to part of North Borneo, whether advanced by the Philippine Government or by private persons in the Philippines."

12. In reply, the Philippine Government expressed its view that there was now, in the light of this opinion expressed by the British Government, "a dispute between the Sultanate of Sulu and the Philippine Government on the one side and Her Majesty's Government on the other regarding the ownership and sovereignty over North Borneo".

13. The reason why the British Government issued its Note of 25 May 1962 may be surmised from a turn of events that took place in the Philippines in the period immediately prior to this date. One month before this Note was issued, on 24 April 1962, the Heirs of the Sultan of Sulu issued an official declaration entitled "Recognition and Authority in Favour of the Republic of the Philippines", which by its terms ceded and transferred sovereignty over territories in North Borneo to the Philippines. This declaration was a follow-up on a petition dated 5 February 1962 by the heirs of the Sultan of Sulu addressed to the Philippine Department of Foreign Affairs, wherein the heirs expressed their desire to see a portion of North Borneo, to which they had succeeded in title, included in the national territory of the Philippines. Also on 24 April 1962, the Philippine Congress in a rare demonstration of unanimity, adopted a "Resolution urging the President of the Philippines to take the necessary steps for the recovery of a certain portion of the Island of Borneo and adjacent islands which belong to the Philippines". This Congressional Resolution was the result of years of study and deliberation, and reiterates a similar concern on the North Borneo claim

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[14] See Great Britain Note of 25 May 1962, Philippine Note of 22 June 1962, Great Britain Note of 7 August 1962, and Philippine Note of 12 September 1962.

expressed by the Philippine Congress in April 1950, when it adopted a "Concurrent Resolution expressing the sense of the Philippines that North Borneo Belongs to the Heirs of the Sultan of Sulu and the ultimate sovereignty of the Republic of the Philippines, and authorizing the President to conduct negotiations for the restoration of such ownership and sovereign jurisdiction over said territory". The British Government must have seen these developments as serious and alarming enough to warrant the issuance of its pre-emptive Note of 25 May 1962.

14. Mr. President, Members of the Court, I have established that the Philippines has an internationally recognized claim, one that has been acknowledged by the other pertinent States. That should suffice for purposes of Article 62. But in the view of the substantive objections of Malaysia, let me briefly review the legal basis of our claim, simply to inform the Court. I will not argue these points at length but would hope that our Application for permission to intervene is accepted and that we will be able to examine the submissions of the Parties, and to thoroughly and briefly present detailed views on these matters that affect our interest, at an appropriate opportunity which the Court may wish to avail us.

### THE BASIS OF THE CLAIM

15. On the basis of the Philippines claim: the Philippine territorial claim in North Borneo is based on a two-fold argument: (1) that dominion and sovereignty over a portion of North Borneo was validly and effectively transferred to the Philippine Government by the way of cession, and (2) that Great Britain's arrogation of sovereignty over that portion of North Borneo was illegal and improper under international law.

16. The first part of this argument — that sovereignty over North Borneo was validly and effectively ceded or transferred to the Philippines — is quite simple in its essentials. It presupposes that sovereignty over a portion of North Borneo was vested in the Sultan of Sulu, until this territory was ceded by the Sultanate to the Philippines in 1962. I will not go any further into the details of this argument, except to say that the Philippines can corroborate and defend these views and the particulars of this argument in any forum or court of law. The second part of the argument — that Great Britain did not legally and validly acquire sovereignty over North Borneo — is more complicated. This segment of the argument must, however, be fully elaborated because it is this

part which is directly involved in the substance of the Philippine intervention in the present proceeding.

17. To prove that Great Britain, and therefore its successor-in-interest, Malaysia, did not validly acquire title to and sovereignty over North Borneo, it is necessary to enquire into the legal status of North Borneo over time. What must be determined is not only the legal status of North Borneo at that point when Great Britain purportedly assumed sovereignty over this territory, but also the legal status of North Borneo prior to British assumption of sovereignty. To determine the legal status of North Borneo, please allow me to go further back in my historical narrative and refer to certain treaties, agreements and other documents which relate to North Borneo. The identification of these treaties, agreements and other documents is, of course, not exhaustive but merely illustrative of the overall point which the Philippines wishes to make: namely, that the legal status of North Borneo, as defined in several historically interlinked documents, prevented Great Britain from acquiring sovereignty over a part of North Borneo.

18. As you can see on the chart that is now displayed, the relevant region was the target of early and very intense exploitation by the European imperial powers. By the end of the nineteenth century, the Dutch Empire controlled what is now Indonesia and, in particular, two thirds of the island of Borneo. Great Britain extended its power from India to Burma or Myanmar in 1862, and then to Malaya, Sarawak and Brunei, in Northern Borneo by the end of the century. My country, the Philippines, conquered by the Spanish Empire in 1571, was ceded to the United States by Spain under the Treaty of Paris in the settlement of the Spanish-American war of 1898. But during the period, the Sultanate of Sulu in North Borneo remained independent and acknowledged to be so by European powers. Let me now go to the agreement between the Sultanate of Sulu and Mr. Overbeck.

## The Sulu-Overbeck Agreement, January 1878

19. The story behind the "grants and commissions" in North Borneo starts with an Austrian named Overbeck and an Englishman named Dent, both businessmen-adventurers in search of enterprise in the Far East. The natural riches of North Borneo beckoned, and they reckoned that if they could obtain territorial grants and sell these later at a profit, they would be the richer. On

29 December 1877, Overbeck and Dent were able to obtain from the Sultan of Brunei three grants or leases to several territories in North Borneo. Being informed that the north-eastern part of Borneo was under the potentate of the Sultan of Sulu, Overbeck and Dent also obtained from the Sulu Sultan on 22 January 1878 a lease or grant to that part of North Borneo. All these territories, it must be pointed out, had already been the subject of similar leases or grants from Brunei and Sulu in the past[13].

20. Overbeck later sold all his rights and interests in the North Borneo grants obtained from the Sultan of Brunei and the Sultan of Sulu to Dent, who then proceeded to form a British North Borneo Provisional Association which in turn bought Dent's titles in the Sulu and Brunei grants. This Provisional Association was reconstituted and became the British North Borneo Company, or BNBC for short, in 1881. At that time, the BNBC as well as the British Government believed that the territories covered by the leases obtained from the Sultans of Sulu and Brunei covered the entire area of North Borneo, as you will see in the red-coloured map, officially used by the British North Borneo Company in 1881[14]. The Philippine-claimed territory is illustrated very roughly by the highlighted area on this map. This is perforce impressionistic, as the actual boundaries of the lease are not clear and remain to be adjudicated.

21. Please allow me to focus on the Sulu-Overbeck agreement of January 1878, inasmuch as this is the primal source of the Philippine historic claim to a portion of territory in North Borneo. This agreement consists of two parts: (1) the grant proper ("grant" being the term used in British official documents), whereby the Sultan of Sulu granted to Overbeck and Dent certain "territories and lands on the mainland of the island of Borneo . . . together with all the islands included therein within nine miles off the coast", and (2) a Commission, which appointed Overbeck as *Dato Bendahara and Raja of Sandakan*, and proclaiming all the powers and privileges accruing to him as such. Under the Sulu-Overbeck agreement, the Sultan leased (and the word is "*Padjak*" in Malaysian) to Overbeck and Dent, "together with their heirs, associates, successors and

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[13] See the so-called Dalrymple treaties and Moses-Torrey agreements, all reprinted in Allen, Stockwell & Wright (Eds.), *A Collection of Treaties and Other Documents Affecting the States of Malaysia 1761-1963*, Vol. II (NY: Oceana, 1981), pp. 371 *et seq.*

[14] "Map showing the Lands ceded by the Sultans of Brunei and Sulu to the BNBC", App. No. 11, in *Papers Relating to the Affairs of Sulu and Borneo, Part I, Presented to both Houses of Parliament by Command of Her Majesty* (London: 1882).

representatives forever all the rights and powers belonging to us over all the territories and lands which are tributary to us". The agreement provides for the payment to the Sultan of Sulu, his heirs or successors of $5,000 every year. The agreement also provides for a restriction clause, not found in the Brunei-Overbeck treaties, which states that "the rights and power conferred by this grant shall never be transferred to any other nation or company of foreign nationality without the sanction of Her Britannic Majesty's Government first being obtained". The idea behind this restriction clause originated from Mr. W. Treacher, British Consul-General based in Labuan, who was himself present when the agreement was concluded and signed as a sole witness to the Sulu-Overbeck grant.

22. Notwithstanding the designation of the agreement as a "grant" in some English translation documents, a majority of historians, scholars and other authorities concur that the agreement, in its authentic language, was in fact and in intent a lease, and not a cession[17]. To be sure, it was a peculiar lease because, on its face, it had a perpetual duration[18]. But what should be of much more interest to us is the question of whether sovereignty or sovereign title to the territory defined in this agreement was ceded or transferred to Overbeck and Dent. Obviously, the answer is in the negative, because sovereignty cannot be assumed by private individuals as such.

23. But there is a more cogent reason to believe that the Sultan of Sulu was never deprived or divested of sovereignty over the territories mentioned in the lease to Overbeck and Dent. The British Government, as well as the major colonial powers for that matter, continuously acknowledged the sovereignty and dominion of the Sultan of Sulu over these territories in North Borneo.

24. Thus, the British Minister of Foreign Affairs, Earl Granville, responding to the Dutch and Spanish protest against the grant of a charter to the BNBC, constantly stressed that the BNBC

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[17] See, for example, the Application of Mr. A. Dent for a Royal Charter addressed to the Marquis of Salisbury, 2 Dec. 1878, in *Papers Relating to the Affairs of Sulu and Borneo*, *supra* n. 6; contemporaneous translation by Spanish authorities, 22 July 1878, in App. 5, *ibid.*; British official documents, *infra*, para. 24; Professor Conklin's authoritative translation, in *Philippine Claim to North Borneo*, Vol. I ( Manila: Bureau of Printing, 1963); and N. Tarling, *Sulu and Sabah: A Study of British policy towards the Philippines and North Borneo from the late eighteenth century* (Kuala Lumpur: Oxford University Press, 1978), Chaps. 4 and 5.

[18] Unlike the Overbeck-Brunei leases, there was no express provision for cancellation/termination.

Charter "recognizes the grants of territory and powers of government made and delegated by the Sultans in whom the sovereignty remains vested"[19]. He declared further:

> "The territories ceded to Mr. Dent will be administered by the Company under the suzerainty of the Sultans of Brunei and Sulu, to whom they have agreed to pay a yearly tribute. The British Government assumes no sovereign rights whatever in Borneo; and indeed, the [BNBC] Charter contemplates the appointment of British Consuls in the territories of the Company."[20]

This echoes the position taken by Lord Salisbury, predecessor of Granville, describing the grants to Overbeck and Dent, as "all but an alienation of the territory. The government of the territory will practically be with them, under the suzerainty of the Sultan . . ." The legal and administrative authorities in Great Britain shared the consensus that the Sultan of Sulu was the suzerain. The British Colonial Office officer commented that "the Sultan purports to delegate his sovereign rights in consideration of an annual payment, and not to cede them absolutely, and I conclude that this has been considered to prevent the full sovereignty from vesting in a British subject"[21]. The British Foreign Office's Assistant Permanent Under-Secretary Julian Pauncefote wrote:

> "It was clearly explained to the Law Officers . . . that the territory was to be administered by the company 'under the suzerainty of the Sultans of Sulu and Brunei' for whom they hold it as Lessees paying rent or tribute, as in the case of the Raja of Sarawak. No question arises, therefore, of the territory vesting in the crown, as is the case when British Subjects take possession of a territory not claimed by any Government and to which the Crown may desire to assert a title . . ."[22]

25. At this point, we can briefly refer to the 1885 Protocol between Great Britain, Germany and Spain, which was an attempt to settle the festering "Sulu issue", or the problem of delineation of spheres of interest in the territories under the dominion of the Sultan of Sulu. In the context of the discussions leading to the conclusion of the Protocol of 1885, the British Government once again emphasized *not* the Crown's sovereignty but the sovereignty of the Sultans over North Borneo, and that the BNBC administered North Borneo in the name of the Sultan of Sulu. When the Spanish Ambassador asked if Britain wished Spain to recognize British claims to sovereignty in Borneo, Granville said that this was not desired, pointing out that "The sovereignty in our view

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[19] Granville to Morier, Foreign Office Doc. [FO] 197, 7 Jan. 1882, in *Papers Relating to the Affairs of Sulu and Borneo, supra.* note 6.

[20] Granville to Bylandt, FO 23, 21 Nov. 1881, in *Papers Relating to the Affairs of Sulu and Borneo, Part II* (London, 1882).

[21] British Colonial Office Doc. [CO] 144/55 (9177), 24 May 1881; also FO 12/56, 2 June 1881.

[22] Foreign Office Memorandum, n.d., 12/56.

vested in the Sultans[,] and was merely delegated by them to the company by their concessions."[23] Permanent Under Secretary Pauncefote reinforced his Government's position: "We must be careful . . . to preserve the Sultan's status as a Sovereign in regard to the east coast of Borneo."[24] He declared "the sovereignty of North Borneo is vested in the Sultan of Sulu, and added that any stipulation Britain might make in an agreed Protocol" "respecting that territory must have the previous assent of the Sultan signified by him through the Company, who administer the Country as the mandatories"[25]. After the conclusion of the 1885 Protocol, Pauncefote insisted that North Borneo was "part of the State of Sulu" in matters of extradition, and that the BNBC was "merely the administrators of a Foreign State, namely Sulu"[26]. Therefore, the British position on the legal status of North Borneo was clear and unequivocal: Britain did not purport to acquire sovereignty over North Borneo when the 1885 Protocol was concluded[27]. The Sultan of Sulu continued to have sovereignty over that territory.

### THE 1903 AGREEMENT BETWEEN THE BNBC AND THE SULTAN OF SULU: CONFIRMATION OF CESSION OF CERTAIN ISLANDS, 22 APRIL 1903

26. After the Sulu-Overbeck and Brunei-Overbeck agreements were concluded, the BNBC continued acquiring more grants or leases from the native rulers in Borneo. The last of these Company acquisitions seems to have been made in 1903, when the BNBC acquired from the Sultan of Sulu another grant over certain islands not included in the 1878 Sulu-Overbeck Agreement. As of the end of 1903, the BNBC had acquired leases for the entirety of the territory of North Borneo covered by over 20 grants and/or leases[28].

27. The English translation of the 1903 Agreement, namely, "Confirmation of Cession of Certain Islands", states that the Sultan of Sulu was "pleased to cede . . . all the islands in the neighbourhood of the mainland of North Borneo from the island of Banggi to Sibuko Bay", and

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[23] Granville to Morier, No. 23 A, 17 Feb. 1882, FO 71/16.

[24] See Memorandum, n.d., PRO 30/29/187.

[25] Memorandum, 10 Sept. 1884, FO 71/17.

[26] See numerous documents quoted and cited in Tarling, *supra* note 7, at 256.

[27] What the 1885 Protocol accomplished, under its Article 3, was the renunciation of Spanish sovereignty claims over the territories administered by the BNBC, in exchange for which Spain's sovereignty over the Sulu Archipelago, defined in Article 2 of the 1885 Protocol, was recognized.

[28] See the two-page "Index of Documents", in CO 874 listing the various grants (as well as territories covered by these grants) to the BNBC from local rulers.

proceeds to identify these islands by name and includes "other islands lying near or round, or lying between the said islands named". The Agreement further states that "the reason why the names of these islands were not mentioned in the [1878 Sulu-Overbeck Agreement] is because it was known and mutually understood that these islands were included in the grant of the countries and islands mentioned in the [1878 Sulu-Overbeck] agreement. This "understanding" may not have been entirely accurate. It will be recalled that the 1878 grant included only islands "within nine miles of the coast". The more probable reason why the BNBC sought to acquire from the Sultan of Sulu the islands named therein was to gain more islands which were not within the ambit of the 1878 Agreement and which lay more than nine miles off the coast of mainland Borneo.

28. It is of course on record that as a consequence of this overreach by BNBC for more territory, the intended acquisitions under the 1903 Agreement unravelled. It is told that the ingenuous Sultan, after he had signed the 1903 Agreement, "said in the presence of an American interpreter that the Islands are American territory and that it may not be agreeable to the American authorities to learn that His Highness has now signed the agreement"[29]. And so when the American authorities in the Philippines were informed of the transaction, they immediately sought to recover the islands, utilizing the framework of the 1885 Protocol, which recognized in its Article 1 the sovereignty of Spain over the entire Sulu archipelago as defined in Article 2. The discussions on this matter led to the 1907 Exchange of Notes between the United States and Great Britain, as a result of which many of these islands, which were to be called "Turtle Islands" and "Mangsee Islands" in the 1930 United States-United Kingdom Exchange of Notes, were deemed to pertain to the United States.

29. The 1903 Agreement proves once again that the Sultan of Sulu was recognized as having continuing and uninterrupted sovereignty over the mainland of North Borneo as well as over islands lying off the coast of mainland Borneo. For assuming that the 1903 Agreement means what it literally says, the Sultan was in effect being asked to confirm the extent of his dominion over which the BNBC had authority to administer and govern. And since Great Britain gave agreement

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[29] Birch to Martin, April 1903, CO 874/272 & 1001.

to the 1903 Agreement[30], it also recognized the unchanged status of the Sultan with respect to the Borneo dominion. All this goes to show that the legal situation since 1878 remained unaltered. The sovereignty of the Sultan over all these territories and islands was upheld. And the record is rich with examples showing how scrupulous Her Majesty's Government was in ensuring that the Company remains "administrator" and not "sovereign"[31].

30. It is therefore quite erroneous for Malaysia, in the present intervention proceedings, to argue that the Sultan of Sulu, as an international legal entity, "disappeared in September 1878 when Spain at last succeeded in conquering the Sultanate" and as of that date no longer — to quote the observation — no longer had "any capacity to hold or cede sovereignty or sovereign rights"[32]. As an international legal entity, the Sultan of Sulu was quite extant in 1903 and was still exercising his sovereignty over North Borneo by concluding an agreement with respect thereto.

### THE 1891 AGREEMENT BETWEEN GREAT BRITAIN AND THE NETHERLANDS DEFINING BOUNDARIES IN BORNEO IN RELATION TO *(A)* THE 1888 AGREEMENT BETWEEN HER MAJESTY'S GOVERNMENT AND THE BRITISH NORTH BORNEO COMPANY AND *(B)* THE 1881 CHARTER GRANTED TO THE BNBC BY THE BRITISH CROWN

31. In the 1891 Agreement between Britain and the Netherlands defining the boundaries in North Borneo, it will be seen that the boundaries defined therein are between, on the one hand, the "the Netherlands possessions" — as it is called in the Agreement — in the Island of Borneo, and, on the other hand, "British protected States" — as the Agreement says — in the same island. We will note that while the boundary sets apart, with respect to the Netherlands Government, so-called "Netherlands possessions", the boundary agreement, with respect to Great Britain does not refer to

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[30] The English-translated text of the 1903 Agreement states "Subject to H.E. Approval" below the signature of the BNBC representative, Mr. Alexander Cook.

[31] In the 1903 Agreement, the BNBC representative, Alexander Cook, signed "For Government", which meant "For the BNBC government". The question of what title the chief of the BNBC Government would assume became subject of a long running debate between, on the one hand, the BNBC and, on the other, the Foreign Office and Colonial Office of the British Government. Upon the suggestion that the title be "Governor" the Foreign Office insisted that since the BNBC Charter used "Principal Representative" of the BNBC, then that official designation should be used. See FO 12/113, 3 August 1900, and documents cited in Tarling, *supra* note 7, at 336-338. "To employ the word [Governor] suggesting that the administrator is a servant of the Crown and that the territory is not independent would be quite wrong from every point of view". See CO 874/8, 30 June 1914. Moreover, the protection agreement referred to "the State of North Borneo" and not "British North Borneo". In 1931, the British Government corrected a French Note about the civil procedure convention which referred to British North Borneo and Sarawak as English colonies. *Note in Tyrrell to Anderson, No. 74*, FO 372/261045, 21 Jan. 1931. Passports were to be "issued in the name of the British North Borneo (Chartered) Company". *Elphinstone to Amery*, CO 874/1003, 15 June 1923.

[32] *Para. 9 (a) and (d), Malaysian observations.*

the equivalent "Great Britain possessions" or "British Crown possessions". Instead, the boundary defined aggregates what belongs to entities referred to as "British Protected States". The British Protected States refer to the States of North Borneo, Sarawak and Brunei. I now wish to draw the attention of the Court to the "State of North Borneo" which is one of the "British Protected States" under the boundary agreement, and the only State implicated in the text of the 1891 Agreement by virtue of the explicit references made to "British North Borneo Company" in the Agreement.

32. The so-called "State of North Borneo" is an entity that was created and placed under British "protection" by virtue of an agreement between the British Government, on the one hand, and the British Company on the other, or BNBC. The "protection agreement"[33] was entered into by the two parties on 12 May 1888. Under this 1888 Protection Agreement, the State of North Borneo was characterized "as an independant State" and defined as the territories which are, to quote the agreement, "governed and administered" by the BNBC. It was the British Government, rather than the "State of North Borneo" or the BNBC, which negotiated and entered into the 1891 Agreement with the Netherlands Government on boundaries in Borneo because under Article III of the 1888 Protection Agreement, the relations between the State of Borneo and all foreign States were to be conducted by Her Majesty's Government. The boundary drawn in the 1891 Anglo-Dutch Agreement therefore delineated, among others, the boundary between the "Netherlands possessions", on the one hand, and the "independent State of Sabah", on the other, the latter being then under the administration of the British North Borneo Company.

33. The underlying purpose of the 1891 Anglo-Dutch Boundary Agreement, which delineated or allocated the respective political "spheres of interest" of Great Britain and the Netherlands in the whole island of Borneo, was clearly stated by the Dutch Foreign Minister. It was "to leave no room for any third Power to step in at any time in North Borneo and claim territory there as being *res nullius*"[34]. Vis-à-vis the Netherlands and other Western Powers, North Borneo was, therefore, put in a British sphere. It was not placed under British sovereignty. With respect to Great Britain, the 1891 Agreement did not purport to vest, and was not intended to vest,

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[33] The 1888 Agreement was never referred to as a "protectorate agreement", and the British Government has consistently stressed that North Borneo was an "independent State" and not a "protectorate State". See Tarling, *supra* note 7, at 338.

[34] Rumbold to Salisbury, 19 November 1888, No. 138, FO 12/79.

title or sovereignty over North Borneo in favour of the British Crown. When the boundary agreement was concluded, it was taken for granted by both Great Britain and the Netherlands that North Borneo was an independent State, although under the protection of Great Britain.

34. The status of North Borneo in 1891 — as an independent State under the protection of Great Britain — remained intact in 1930, when the United States and the United Kingdom concluded in January 1930 the Convention regarding the Boundary between the Philippine Archipelago and North Borneo. Similar to the Anglo-Dutch Boundary Agreement of 1891, this treaty refers to territories that, to quote the Agreement, "belong to the State of North Borneo", or "the State of North Borneo" being "under British protection".

35. And now the question arises: if it was not the intention of the British Crown to establish sovereignty over North Borneo when the 1891 Agreement was concluded, who then had the sovereign power over the "independent" State of North Borneo at that time? Was it the BNBC, the entity which then administered North Borneo?

36. The historical evidence shows that the BNBC was not the sovereign authority in North Borneo when the 1891 Anglo-Dutch Boundary Agreement was concluded. A close look at the 1888 Protection Agreement between the British Crown and the BNBC will immediately demonstrate why this is so. Through the 1888 Protection Agreement between the British Crown and the BNBC, Great Britain was able to consolidate its political control over North Borneo[36]. And while the Protection Agreement recognized that North Borneo was administered by the BNBC, it did not state nor suggest that sovereignty over North Borneo appertained to, or was vested in, the BNBC.

37. There is no reason to believe that the BNBC held sovereignty over North Borneo at that time. Firstly, as a private entity incorporated under the laws of Great Britain, it could not have possessed sovereign powers on its own under international law. True, it enjoyed extensive powers, recognized in the 1888 Protection Agreement, to administer the territory of North Borneo, but this in no way meant that it was sovereign. Thus, in 1907 the BNBC, represented by the British

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[36] It was able to achieve this through the mandate given it to exercise certain pivotal rights, namely, (1) to direct the foreign relations of the State of North Borneo, (2) to establish consular offices in this foreign State, and (3) to consent to the cession or alienation of any part of the territory of North Borneo made by the BNBC to any foreign State or any subject or citizen thereof.

Government, agreed that certain islands in North Borneo under its administration fell under the sovereignty of the United States. In the July 1907 British-United States Exchange of Notes reflecting this agreement, it was expressly provided that: "the privilege of administration shall not carry with its territorial rights, such as those of making grants or concessions in the islands in question to extend beyond the temporary occupation of the company". The understanding that this privilege of administration enjoyed by the BNBC did not carry with it sovereign rights was reiterated in 1930 when the United States and the United Kingdom, through the Exchange of Notes accompanying the United States-United Kingdom Boundary Agreement, which I earlier referred to, spelled out the details of the 1907 Agreement.

38. In the second place, as we shall find out very shortly when we examine the BNBC Charter and the circumstances surrounding the grant of the BNBC Charter, the BNBC was not authorized to assume sovereign title over the territory of North Borneo for and on behalf of the British Crown.

39. The BNBC was incorporated as a British subject by virtue of a Royal Grant dated 1 November 1881[36]. If we peruse the BNBC Charter closely, nowhere can we find a provision or language which grants the BNBC authority to acquire and hold territory for and on behalf of the British Crown. Under the British legal system, the position of the BNBC was, according to Granville, therefore, totally very different from the position of the British East India Company, or the Hudson's Bay Company, or the New Zealand Company, which was empowered to perform acts of sovereignty for and on behalf of the British Crown[37]. Moreover, the British Government's representations and assurances to foreign governments at the time are replete with testimonials showing that the grant of a Royal Charter to the BNBC did not have a political object and was never intended to invest the BNBC with a sovereign character. For instance, Granville, in response

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[36] Granville to Morier, 7 January 1882, FO 197, *supra* note 9:

> "The 'British North Borneo Company' are in fact established under three Charters:
>
> 1. The Charter and territorial Concession from the Sultan of Sulu.
> 2. The Charter and the territorial Concession from the Sultan of Brunei.
> 3. The British Charter of Incorporation.
>
> The first two Charters, from the Sultans of Sulu and Brunei, are those under which the Company derive their title to the possession of the territories in question, and their authority to administer the government of those territories by delegation from the Sultans."

[37] *Ibid.*

to insistent objections from the Dutch Minister Count de Bylant to the granting of the Charter, repeatedly stressed that the BNBC was a purely private commercial undertaking. Thus

> "Her Majesty's Government have already explained to the Government of the Netherlands that the grant of the Charter did not in any way imply the assumption of sovereign rights in North Borneo. It is therefore unnecessary to pursue this discussion further."[38]

Granville also assured the Spanish Government: "In granting the Charter to the North Borneo Company, we had laid no claim to sovereignty, either on behalf of Her Majesty's Government or of the company."[39] Once again, he stressed:

> "The Crown in the present case assumes no dominion or sovereignty over the territories occupied by the Company, nor does it purport to grant to the Company any powers of government thereover; it merely confers upon the persons associated the status and incidents of a body corporate."[40]

## NORTH BORNEO CESSION ORDER, 1946

40. The so-called "North Borneo Cession Order in Council" of 10 July 1946 purported to annex North Borneo to Great Britain as part of His Majesty's dominion, and to transform it into the Colony of North Borneo. The basis of this annexation, or colonization of North Borneo by Great Britain was an Agreement dated 26 June 1946 entered into between the British Crown, on the one hand, and the British North Borneo Company, on the other. In this Agreement, the BNBC purportedly ceded and transferred all its rights, powers and interests in North Borneo to the British Crown in this language: "to the intent that the Crown should have full sovereign rights, and title to, the territory of the State of North Borneo".

41. If we believe for a moment what this Cession Order literally says[41], it tells us that Great Britain certainly did NOT have sovereignty over, or title to, North Borneo before 15 July 1946. It also tells us that the BNBC had ceded all its "rights, powers and interests" to Great Britain effective 15 July 1946. The inference is that the BNBC transferred or ceded sovereignty and dominion over

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[38] Granville to Bylant, 7 Jan. 1882, *supra* note 7.

[39] Granville to Morier, 17 Feb. 1882, *supra* note 13.

[40] Granville to Morier, 7 Jan. 1882, *supra* note 7.

[41] The policy basis for the annexation of North Borneo is articulated in the Secret "*Draft Directives for Further Planning in South-East Asia: War Cabinet Paper, 18 May 1944*", where it is stated that: "This jurisdiction will render unnecessary any further dependence on Treaties with Rulers in any future revision of the constitutional arrangements." Text in Porter & Stockwell, *British Imperial Policy and Decolonization 1938-64*, Vol. 1, 1938-51 (Macmillan Press, 1987), pp. 195, 198.

North Borneo to Great Britain. But then, it must be pointed out, the Cession Order did not expressly state that the BNBC had sovereignty or dominion over North Borneo before 15 July 1946. The question that then arises logically is this: was the BNBC in a legal position to transfer or cede a sovereign title over North Borneo to Great Britain?

42. The position of the Philippine Government is that the Cession Order in Council of 1946 did not and could not have transferred sovereignty over North Borneo to the British Crown for the simple reason that the BNBC did not acquire, and was never authorized to acquire, sovereignty over North Borneo. The British Government, therefore, assumed something that could not possibly have been ceded to it by the BNBC, and which was beyond the latter to transfer by way of right or power. The principle follows an ancient precept: the transferee cannot obtain more rights than the transferor. This highly irregular transaction between the BNBC, on the one hand, and the British Crown, on the other, prompted an American adviser to the Philippine President, the former Governor-General to the Philippines Francis Harrison, to assert that the unilateral act of Great Britain in annexing North Borneo as a colony by way of the 1946 Cession Order was, and I quote him, "an act of political aggression" which should be repudiated by the Philippines, as, in fact, it did.

## CONCLUSION

43. Let me conclude Mr. President, Members of the Court, with a few propositions. The foregoing examination of some of the treaties, agreements and documents which illuminate the legal status of North Borneo, specifically from 1878 up to 1946, shows that the Sultan of Sulu enjoyed *de jure* continuous and uninterrupted sovereignty over those territories in North Borneo which the Sultan leased to the BNBC and were under the latter's administration. Great Britain and the BNBC who, by their conduct and legal commitments, have upheld the independence and sovereignty of the Sultan over North Borneo, within the framework of the British legal system as well as before the international community, are now estopped from asserting otherwise.

44. Great Britain recognized the Sultanate's sovereignty over North Borneo from 1878 up to 15 July 1946, when the Sultanate as an international legal personality was sought to be abolished

by Great Britain through the 1946 Cession Order. The annexation of Sulu's dominion in North Borneo effected through this Cession Order was thus wholly illegal.

45. It is our submission that any claim or title to territory in or islands near North Borneo that assumes or posits or purports to rest a critical link on the legitimate sovereign title of Great Britain from 1878 up to the present is unfounded. Similarly, the interpretation of any treaty, agreement or document concerning the legal status of North Borneo as well as islands off the coast of North Borneo which would presume or take for granted the existence of British sovereignty and dominion over these territories has no basis at all in history as well as in law and, if upheld by the Court, it would adversely affect an interest of a legal nature on the part of the Republic of the Philippines.

46. Mr. President, Members of the Court, this completes my Government's presentation in this phase. I must, as I do now, thank you for this opportunity to be heard on behalf of the Republic of the Philippines. May I now withdraw.

The PRESIDENT: Thank you very much, Prof. Magallona. Je vous remercie. Ceci conclut le premier tour de plaidoiries des Philippines. La Cour se réunira demain matin mardi 26 juin à 10 heures pour le premier tour de plaidoiries de l'Indonésie et de la Malaisie. La séance est levée.

*L'audience est levée à 12 h 30.*

**CR 2001/2**

**International Court of Justice** **Cour internationale de Justice**

**THE HAGUE** **LA HAYE**

## YEAR 2001

***Public sitting***

***held on Tuesday 26 June 2001, at 10 a.m., at the Peace Palace,***

***President Guillaume presiding***

***in the case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)***

***Application for permission to intervene filed by the Republic of the Philippines***

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## VERBATIM RECORD

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## ANNÉE 2001

***Audience publique***

***tenue le mardi 26 juin 2001, à 10 heures, au Palais de la Paix,***

***sous la présidence de M. Guillaume, président***

***en l'affaire relative à la Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)***

***Requête à fin d'intervention déposée par la République des Philippines***

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## COMPTE RENDU

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|---|---|---|
| *Present:* | **President** | **Guillaume** |
| | **Vice-President** | **Shi** |
| | **Judges** | **Oda** |
| | | **Bedjaoui** |
| | | **Ranjeva** |
| | | **Fleischhauer** |
| | | **Koroma** |
| | | **Vereshchetin** |
| | | **Higgins** |
| | | **Parra-Aranguren** |
| | | **Kooijmans** |
| | | **Rezek** |
| | | **Al-Khasawneh** |
| | | **Buergenthal** |
| | **Judge *ad hoc*** | **Weeramantry** |
| | | **Franck** |
| | **Registrar** | **Couvreur** |

*The Government of the Republic of the Philippines is represented by:*

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Mr. Merlin M. Magallona, Under-Secretary of Foreign Affairs, Government of the Republic of the Philippines,

*as Co-Agent and Counsel;*

Professor W. Michael Reisman, Yale Law School,

*as Counsel and Advocate;*

Dr. Peter Payoyo, University of the Philippines,

*as Counsel;*

Mr. Alberto A. Encomienda, Secretary-General, Maritime and Ocean Affairs Center, Department of Foreign Affairs,

Mr. Alejandro B. Mosquera, Assistant Secretary, Office of Legal Affairs, Department of Foreign Affairs,

Mr. George A. Eduvala, Attaché, Embassy of the Republic of the Philippines in the Netherlands,

Mr. Eduardo M. R. Meñez, Second Secretary, Embassy of the Republic of the Philippines in the Netherlands,

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Mr. Rodman R. Bundy, Avocat à la Cour d'appel de Paris, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris

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Ms Loretta Malintoppi, Avocat à la Cour d'appel de Paris, Member of the [illegible] Bar, Frere Cholmeley/Eversheds, Paris,

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Mr. Donnilo Anwar, Director for Treaties and Legal Affairs, Department of Foreign Affairs,

Mr. Major General Djokomulono, Territorial Assistant to Chief of Staff for Territorial Affairs, Indonesian Armed Forces Headquarters,

Mr. Rear-Admiral Yoos F. Menko, Intelligent Assistant to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Kris Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

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Mr. Raja Aznam Nazrin, Counsellor of the Embassy of Malaysia in the Netherlands,

Mr. Nik Aziz Nik Yahya, First Secretary of the Embassy of Malaysia in the Philippines,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Division, Department of Survey and Mapping, Malaysia,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

Mr. Shaharuddin Onn, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

*as administrative staff.*

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte et nous allons tout d'abord entendre les plaidoiries présentées pour l'Indonésie, et je donne la parole immédiatement à S. Exc. M. Hassan Wirajuda, agent de la République d'Indonésie.

Dr. WIRAJUDA: Mr. President, distinguished Members of the Court, it is a very great honour indeed for me to appear before you on behalf of my Government. This is the first time that the Republic of Indonesia has had occasion to appear before this distinguished Court. My Government is fully conscious of the privilege and responsibilities that such an appearance entails.

I must say that, following the deposit of Indonesia's and Malaysia's Replies on 2 March 2001, I had thought that I would first enjoy the privilege of appearing before you in connection with the hearings on the merits of the case. Indonesia was surprised, to say the least, that 11 days after the Replies were filed, our neighbours and friends in the Philippines decided to file an Application for permission to intervene in a case which Indonesia and Malaysia had brought by Special Agreement before the Court.

It may assist the Court in assessing the merits of the Philippines Application if I put the matter in perspective.

The dispute between Indonesia and Malaysia concerning sovereignty over the islands of Ligitan and Sipadan dates back to 1969. At that time, Indonesia and Malaysia were engaged in negotiations over various segments of their continental shelf boundary. While Indonesia and Malaysia were then successful in delimiting a large part of their common maritime boundaries, delimitation off the east coast of Kalimantan was impeded by the fact that we could not agree on questions of sovereignty over Ligitan and Sipadan, two islands which were then uninhabited lying off the east coast of Indonesia's Kalimantan province and Malaysia's east coast of Sabah. Indeed the dispute as to sovereignty over the two islands only became apparent at that stage. Since then, in order to preserve amicable bilateral relations, Indonesia scrupulously respected the status quo regarding two islands which was agreed with Malaysia.

Throughout the ensuing years, Indonesia and Malaysia made a number of attempts to resolve this dispute by negotiation, most notably by means of a series of written exchanges in the early 1990s. When these efforts failed to reach a satisfactory result, Indonesia and Malaysia signed a

Special Agreement on 31 May 1997 agreeing to submit the question to the Court pursuant to Article 31, paragraph 1, of the Statute of the Court.

The signature of the Special Agreement and its notification to the Court was the first for two South-East Asian countries. Never before has the Court been seised of a bilateral dispute by two ASEAN countries by means of Special Agreement. Indonesia believes that this step set a positive precedent for the peaceful resolution of disputes in the region.

Instruments of ratification were exchanged by Indonesia and Malaysia on 14 May 1998 and the Special Agreement was registered with the United Nations on 29 May 1998. The Special Agreement was notified to the Court on 2 November 1998, some two-and-one-half years ago.

Since that date, Indonesia and Malaysia have submitted three rounds of written pleadings — Memorials were filed on 2 November 1999, Counter-Memorials on 2 August 2000 and Replies on 2 March 2001. Having submitted three rounds of written pleadings in the case, the Parties agreed in March 2001 that there was no need for any further written submissions and that the case was ripe for oral hearings on the merits.

Mr. President, distinguished Members of the Court, the dispute between Indonesia and Malaysia concerning Ligitan and Sipadan has existed for over 30 years. Moreover, the conclusion of the Special Agreement, which received a good deal of public attention in South-East Asia when it was signed because of its unprecedented nature, has been a matter of public knowledge for some four years. Indonesia and Malaysia have since completed three rounds of written pleadings, the time-limits for which were also a matter of public knowledge.

Throughout this period, the Philippines never once intimated that it had any interest of a legal nature that might be affected by a decision in the case. It was only on 13 March 2001, after Indonesia and Malaysia had filed their Replies, that the Philippines deposited their request for permission to intervene in the case.

I will leave it to my colleagues, Professor Pellet and Mr. Bundy, to expand on the untimely nature and other aspects of the Philippines Application. I should point out, however, that on 5 April 2001, the Philippines Government sent a Note Verbale to the Department of Foreign Affairs of the Republic of Indonesia in which the Philippines expressly stated that it does not have any territorial interest on either Ligitan or Sipadan island. Yet it is precisely the question of sovereignty over these two islands — and that question alone — which formed the subject-matter of the dispute which Indonesia and Malaysia have submitted to the Court.

In these circumstances, it is difficult for my Government to see *how* the Philippines, at this late stage, can claim to have any interest of a legal nature which may be affected by a decision in the case.

The Philippines Application instead appears to be focused on the Philippines historic claim to Sabah in North Borneo. Indonesia is of course aware of this claim, but since we are not dealing with the merits of the Philippines historic claim, Indonesia does not consider it appropriate to express any views. As acknowledged by the Philippines itself, the Philippines claim does not involve either Ligitan or Sipadan and thus has no proper place in the present proceedings between Indonesia and Malaysia.

Having said this, I must, for the sake of the record, make one comment on Malaysia's written observations on the Philippines Application. At paragraph 43 of Malaysia's observations, Malaysia states that "the Court is called on to resolve a specific claim made by Indonesia, not to range around a region comprehensively resolving its many disputes". While Indonesia agrees with the second part of this statement, it is not correct to say that the Court has been called upon to resolve a claim made by Indonesia. The fact of the matter is that *both* Indonesia and Malaysia recognize that they have a long-standing dispute concerning sovereignty over the islands of Ligitan and Sipadan. Both Parties, by means of a Special Agreement, have submitted their respective claims and positions on this issue to the Court.

I must also point out that the fact that Indonesia is speaking before Malaysia at these hearings does not imply that Indonesia accepts that it is the "claimant" in the case, nor does it prejudge the order of speaking for the merits.

It is in part precisely because the case has been brought by Special Agreement that Indonesia is concerned by the implications of the Philippines request. As I have noted, for four years now Indonesia and Malaysia have taken bilateral steps to resolve an issue which concerns Indonesia and Malaysia alone — and which the Philippines acknowledge does not concern itself. Prior to the Philippines Application, there has never been any suggestion that a third party might have any interest of a legal nature in the resolution of this dispute.

Indonesia is anxious for the case to proceed in an orderly and expeditious manner. This was Indonesia's intention in concluding and notifying the Special Agreement. Should the Philippines Application be granted, considerable delay will be entailed since the Philippines will have the opportunity of filing a further written statement to which Indonesia and Malaysia will have the opportunity to reply. Given the circumstances in which the Application has been filed, Indonesia does not consider that this should occur or that the Philippines Application is justified.

Mr. President, Members of the Court, that concludes my remarks on the Philippines Application. I will be followed by Professor Alain Pellet who will address the related issues of the alleged interest of a legal nature advanced by the Philippines as justification for its Application and the precise object of the intervention. Professor Pellet will then be followed by Mr. Bundy, who will comment on the untimely nature of the Philippines Application and on the implications of that Application for the case between Indonesia and Malaysia.

With these introductory remarks, Mr. President, I would be grateful if you could give the floor to Professor Pellet who will continue with Indonesia's presentation.

I thank you, Mr. President, distinguished Members of the Court, for your kind attention.

The PRESIDENT: Thank you very much Your Excellency. Et je donne maintenant la parole au professeur Alain Pellet.

M. PELLET : Merci, Monsieur le président. Monsieur le président, Madame et Messieurs de la Cour, l'intervention fait partie de ces institutions procédurales que l'on pouvait croire tombées, sinon en désuétude, du moins en léthargie. Le renouveau d'intérêt marqué par les Etats pour le règlement juridictionnel international, tout spécialement par votre Cour, l'a peut-être tirée de la marginalisation à laquelle elle semblait promise.

Si j'ai bien compté, quatre Etats se sont essayé à intervenir devant la Cour actuelle avant l'arrêt de votre Chambre du 13 septembre 1990 dans l'affaire du *Différend frontalier terrestre, insulaire et maritime* (*C.I.J. Recueil 1990*, p. 92), une seule fois avec succès, mais sur le fondement de l'article 63 et non de l'article 62 (intervention de Cuba dans l'affaire *Haya de la Torre* — voir l'arrêt du 13 juin 1951, *C.I.J. Recueil 1951*, p. 76-77). Depuis 1990, l'intervention est, assurément, devenue, je dirais, plus «tentante» puisque, pour la première fois, une requête à fin d'intervention

fondée sur l'article 62, celle du Nicaragua, avait été admise, comme ce fut à nouveau le cas, tout récemment, de celle de la Guinée équatoriale que vous avez accueillie par votre ordonnance du 21 octobre 1999.

Mais, alors que, dans ce dernier cas, la Guinée équatoriale pouvait, sans aucun doute, se prévaloir de ce qu'un intérêt était «pour elle en cause», il n'en va nullement ainsi s'agissant de la requête à fin d'intervention que la République des Philippines vous présente. Votre jurisprudence s'est peut-être assouplie, mais nos amis philippins semblent confondre souplesse et laxisme.

Il est vrai qu'ils observent une étrange mais totale discrétion vis-à-vis des précédents. J'ai écouté et relu avec l'attention qu'elle mérite la plaidoirie du professeur Michael Reisman et je n'y ai trouvé, en tout et pour tout, que trois mentions d'une unique décision antérieure de la Cour en matière d'intervention, celle justement de 1990 relative à l'intervention du Nicaragua dans l'affaire *El Salvador/Honduras* (CR 2001/1, 25 juin 2001, p. 22, par. 15; p. 28, par. 30 et p. 30, par. 41). Je connais mon savant contradicteur et je ne peux imaginer un instant qu'il ait péché par ignorance : il connaît votre jurisprudence mieux que quiconque. Non, c'est par «adresse» qu'il a péché : il sait que la demande des Philippines est en contradiction avec tout ce que vous avez toujours dit sur l'intervention de l'article 62 et il a préféré passer pudiquement sur cet aspect des choses.

Je n'aurai évidemment pas l'outrecuidance de vous apprendre, Madame et Messieurs de la Cour, ce que la Cour a dit et répété. Mais il me paraît nécessaire de replacer la requête à fin d'intervention des Philippines dans ce contexte jurisprudentiel dans lequel, pour ma part, et contrairement à mon ami Michael Reisman, je puiserai largement.

«Il es[illegible]rai», comme vous l'avez rappelé récemment,

> «que, conformément à l'article 59, les arrêts de la Cour ne sont obligatoires que pour les parties en litige et dans le cas qui a été décidé. Il ne saurait être question d'opposer [aux Philippines] les décisions prises par la Cour dans des affaires antérieures. La question est en réalité de savoir si, dans la présente espèce, il existe pour la Cour des raisons de s'écarter des motifs et des conclusions adoptés dans ces précédents» (arrêt du 11 juin 1998, affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigéria, exceptions préliminaires, C.I.J. Recueil 1998*, par. 28).

Pas davantage que dans l'affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigéria* (je viens de paraphraser un extrait de l'arrêt sur les exceptions préliminaires de 1998), il n'existe ici de raison de s'écarter de votre jurisprudence antérieure. L'arrêt de 1990 sur l'intervention du Nicaragua a montré que votre Chambre n'avait pas eu une conception *rigide* des conditions mises à l'intervention par l'article 62; je ne pense pas que vous deviez, ni puissiez aller au-delà.

Or les Philippines vous demandent infiniment plus. Car il me semble que ce qu'elles attendent de vous est une sorte de blanc-seing laissé à la subjectivité des Etats tiers par rapport à un différend : M. Reisman a souligné la subjectivité de l'Etat qui demande à intervenir, à laquelle l'article 62 du Statut renverrait : «Article 62 allows the *subjective* appreciation of the intervening state to be the contingency...» (CR 2001/1, p. 28, par. 34; les italiques sont de nous). C'est oublier que la Cour exerce son contrôle sur les appréciations des Etats concernés, y compris, bien sûr, de celui qui cherche à intervenir, et ce contrôle, elle l'exerce non pas d'une façon «discrétionnairement subjective», mais sur la base de l'article 62 du Statut, dont l'interprétation, quoi que semblent en penser nos contradicteurs, est singulièrement éclairée par la jurisprudence (cf. affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne), C.I.J. Recueil 1981*, arrêt du 14 avril 1981, p. 12, par. 17).

M. Reisman en est sans doute bien conscient puisqu'il a insisté avec vigueur sur le caractère inhabituel de l'intervention tentée par les Philippines (CR 2001/1, 25 juin 2001, par. 2, p. 17) :

— la nature de l'intérêt invoqué par elles serait «different from previous intervention cases»;

— l'affaire elle-même serait «different from the precedents»;

— et les Philippines, du fait qu'elles n'ont pas eu accès aux écritures des Parties subiraient «a handicap that was not present in previous cases» (*ibid.*, par. 3, p. 18).

C'est grandement exagérer la spécificité de l'incident de procédure qui nous réunit et aucune des particularités mises en avant par l'avocat des Philippines n'emporte la conviction :

— Malte, par exemple, se trouvait exactement dans la même situation que les Philippines lorsqu'elle a voulu intervenir dans l'affaire *Tunisie/Libye* en 1981 : elle n'avait pu obtenir communication des pièces de procédure antérieures (cf. l'arrêt du 14 avril 1981, *C.I.J. Recueil 1981*, p. 5, par. 4) et il en est allé de même de l'Italie en 1984 (cf. l'arrêt du 21 mars 1984, *C.I.J. Recueil 1984*, p. 5, par. 4); quant à Fidji dans les affaires des *Essais nucléaires* (cf. les ordonnances du 12 juillet 1973, *C.I.J. Recueil 1973*, p. 230 et 234) et à El Salvador dans celle relative aux *Activités militaires et paramilitaires au Nicaragua et contre* *celui-ci* (cf. l'ordonnance du 4 octobre 1984, *C.I.J. Recueil 1984*, p. 215), il semble que ces Etats n'avaient pas même demandé à recevoir communication des pièces de procédure antérieures à leur requête;

— certes, chaque affaire est un *unicum*, mais celle-ci est très proche, sous un aspect du moins, de celle relative au *Différend frontalier* entre El Salvador et le Honduras dans laquelle le Nicaragua a voulu intervenir : là aussi, il s'agissait, notamment, de déterminer la souveraineté respective des parties sur certaines îles dans le golfe de Fonseca; mais la Chambre, ayant constaté qu'il n'existait pas de différend entre le Nicaragua et les parties au différend sur ce point, a rejeté la requête en intervention dans la mesure où elle portait sur le «volet insulaire» de l'affaire (cf. l'arrêt du 13 septembre 1990, affaire du *Différend frontalier terrestre, insulaire et maritime, Requête du Nicaragua à fin d'intervention*, *C.I.J. Recueil 1990*, p. 119, par. 65-67); et s'il est vrai que l'affaire que l'Indonésie et la Malaisie vous ont soumise ne porte pas sur un problème de délimitation maritime (alors que la plupart de celles dans lesquelles un incident de procédure de ce type s'est produit avaient cet objet), on peut penser que la Cour se serait montrée beaucoup plus souple pour admettre des interventions étant donné le caractère assez vague, pour dire le moins, des principes («équitables») qu'elle met en oeuvre dans ce domaine; or la Cour n'a cédé aux sirènes de l'intervention qu'une seule fois dans un cas de ce genre (cf. l'ordonnance du 21 octobre 1999 relative à la *requête de la Guinée équatoriale à fin d'intervention* dans l'affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigéria*), encore est-ce dans une affaire dont elle avait été saisie par requête et dans laquelle les deux parties — il s'agit du Cameroun et du Nigéria — avaient donné leur accord à l'intervention;

— enfin, la demande d'intervention de Malte ne paraît pas non plus aussi inhabituelle que le dit l'adroit conseil des Philippines en ce qui concerne l'intérêt juridique pour elles en cause; dans la mesure où il semble s'agir principalement, sinon exclusivement, d'obtenir que l'Etat qui souhaite intervenir puisse informer la Cour de sa façon de voir sur le droit applicable et sur l'interprétation qu'il convient de donner aux traités et accords invoqués par les Parties et qui pourraient avoir une incidence sur le différend qui l'oppose à la Malaisie, il s'agit là de raisons très proches de celles qui avaient conduit Malte et l'Italie à tenter d'intervenir, sans succès, dans les affaires du *Plateau continental* qui ont donné lieu aux arrêts de 1982 et de 1985.

Je reviendrai sur ce dernier point un peu plus tard, Monsieur le président. Mais, auparavant, il nous faut essayer de comprendre exactement en quoi peut bien consister l'intérêt juridique que les Philippines disent être p[illegible] elles en cause dans l'instance entre l'Indonésie et la Malaisie.

*

Respectant, formellement au moins, la lettre de l'article 81 du Règlement de la Cour, la requête à fin d'intervention des Philippines distingue entre d'une part l'intérêt juridique dont ce pays se prévaut, et, d'autre part, l'objet de la requête.

Au paragraphe 4, les Philippines affirment avoir un intérêt d'ordre juridique à deux points de vue différents :

— en premier lieu, elles seraient intéressées (la requête parle de «*legitimate concern*») par «les traités, les accords et autres éléments de preuve fournis par les Parties et pris en compte par la Cour qui ont une incidence directe ou indirecte sur la question du statut juridique du Bornéo septentrional» (requête, p. 5);

— en second lieu, la future décision de la Cour mettrait

> «inévitablement et sans aucun doute possible en cause la revendication territoriale toujours en suspens de la République des Philippines sur le Bornéo septentrional ainsi que le droit et l'intérêt juridique direct consistant pour les Philippines à régler cette revendication par des moyens pacifiques» (*ibid.*).

Les Philippines précisent qu'il s'agit là des éléments principaux mais non limitatifs de l'intérêt juridique qui serait en cause pour elles, «sans pour autant s'y limiter» écrivent-elles, mais ni dans leur requête, ni dans les plaidoiries orales d'hier, elles n'ont évoqué d'autres aspects de cet intérêt.

Par ailleurs, au paragraphe 5 de sa requête à fin d'intervention, la République des Philippines détaille l'objet de celle-ci, qui serait triple. Elle viserait

— à préserver les droits qu'elle prétend avoir sur le territoire du Bornéo septentrional;

— à informer la Cour de la nature et de la portée de ces droits historiques; et

— à «prendre plus largement en compte le rôle indispensable que joue la Cour en matière de prévention généralisée des conflits et non pas simplement aux fins de la résolution des différends d'ordre juridique» (requête, p. 7).

Bien que l'article 81 du Règlement de la Cour fasse la différence entre l'intérêt d'ordre juridique en cause aux yeux de l'Etat qui demande à intervenir d'une part et l'objet précis de l'intervention d'autre part, la distinction n'est certainement pas évidente. Et je ne jetterai pas la pierre aux Philippines pour ne guère contribuer à la clarifier : les deux rubriques de leur requête, que je viens de résumer, se télescopent quelque peu et redisent, au fond, deux fois la même chose sous des formes à peine différentes.

Il me semble cependant, Monsieur le président, que l'on peut faire une distinction, qui elle est assez claire, entre d'un côté l'intérêt juridique que l'Etat demandant à intervenir cherche à protéger et, de l'autre côté, les moyens qu'il entend utiliser à cette fin — c'est probablement ce que l'article 81 du Règlement vise lorsqu'il parle de «l'objet précis de l'intervention». Et c'est d'ailleurs ce qui ressort de l'arrêt de la Chambre de la Cour sur la requête en intervention du Nicaragua de 1990. (*Rec.* 1990, p. 129, par. 87.)

S'agissant de cet objet, ainsi défini, les choses paraissent relativement claires : l'intervention demandée a pour but unique d'informer la Cour des trois «préoccupations» des Philippines, qui constituent, à leurs yeux, un intérêt juridique en cause pour elles, sans qu'elles aient, pour autant, l'intention de devenir partie à l'instance et, donc, d'être liées par le futur arrêt au fond. Et nous savons, au moins depuis la décision de la Chambre de 1990 que je viens de mentionner, que ceci peut constituer l'objet légitime d'une intervention (*C.I.J. Recueil 1990*, p. 130, par. 90). La Cour elle-même a du reste confirmé cette possibilité dans son ordonnance du 21 octobre 1999 par laquelle elle a autorisé la Guinée équatoriale à intervenir dans l'instance entre le Cameroun et le Nigéria.

Certes, ceci ne va pas sans poser quelques problèmes, car il reste à se demander quel effet une telle intervention, en tant que «non-partie», peut avoir. Mais le fait est là : la Cour ne la considère pas comme inappropriée *per se*.

Mais l'information de la Cour ne constitue pas, en lui-même, l'objet légitime d'une intervention. La Cour, dont la curiosité d'esprit est assurément grande, n'est cependant pas une institution académique ou universitaire (voir l'opinion individuelle de sir Gerald Fitzmaurice jointe à l'arrêt de la Cour du 2 décembre 1963 dans l'affaire du *Cameroun septentrional*, *C.I.J. Recueil 1963*, p. 99). Encore faut-il que cette intervention «informative» vise à la protection d'un intérêt d'ordre juridique effectivement en cause pour l'Etat qui demande à intervenir. Et c'est à celui-ci d'en établir l'existence. A ce point de vue, l'article 62 du Statut présente un caractère très différent de l'article 63, au regard duquel l'intérêt juridique de l'Etat intervenant est présumé. En revanche, dans le cadre de la première de ces deux dispositions, comme l'a déclaré la Chambre de la Cour en 1990 : «c'est à l'Etat qui demande à intervenir d'établir de façon convaincante ce qu'il allègue et donc de supporter la charge de la preuve», étant entendu toutefois «qu'il doit seulement démontrer que son intérêt «peut» être affecté et non qu'il le sera ou qu'il le sera nécessairement» (*C.I.J. Recueil 1990*, p. .117, par. 61; voir aussi l'opinion individuelle du Juge Mbaye jointe à l'arrêt du 21 mars 1984 relatif à la *requête en intervention de l'Italie* dans l'affaire du *Plateau continental (Jamahiriya arabe libyenne/Malte)*, *C.I.J. Recueil 1984*, p. 43).

Mais cette preuve, les Philippines ne l'apportent nullement. Je dirais même, Monsieur le président, qu'elles apportent, de façon éclatante, la preuve contraire.

Comme je l'ai dit, la requête philippine ne me paraît pas se recommander d'une logique cartésienne irréfutable. Toutefois, si l'on combine ses paragraphes 4 et 5, que j'ai résumés il y a quelques instants, avec ce que nous avons entendu hier, l'intérêt juridique que les Philippines visent à protéger en informant la Cour est constitué des éléments suivants, en allant du plus spécifique au plus général :

1) ses «préoccupations légitimes» au sujet des traités, accords et autres éléments de preuve fournis par les Parties;
2) sa «revendication historique et juridique sur le territoire du Bornéo septentrional»; et
3) l'appréciation plus large du rôle de la Cour «dans la prévention généralisée des conflits»; je ne m'arrêterai d'ailleurs pas à ce dernier point sur lequel les Philippines ne sont pas revenues en plaidoirie et qu'il est, de toutes manières, difficile de concilier avec le texte clair de l'article 38 du Statut qui assigne à la Cour la mission, exclusive, «de régler conformément au droit international les différends qui lui sont soumis».

Avant de m'arrêter quelques instants sur chacun des deux autres points, je souhaite, avec votre permission, Monsieur le président, faire une observation d'ordre général, qui s'applique à l'un comme l'autre de ces deux points. Pour tenter d'en prouver l'existence, l'Etat qui demande à intervenir s'appuie

— dans un cas, sur des «préoccupations légitimes» [«*legitimate concerns*» dans le texte anglais] — les préoccupations que feraient naître les traités, accords et autres éléments de preuve fournis par les Parties;

— et dans l'autre, il s'appuie sur sa «revendication [*claim* dans le texte anglais] juridique et historique sur le territoire du Bornéo septentrional».

Mais l'article 62 du Statut, sur lequel est fondé la requête philippine, ne parle pas de «préoccupations», ni même de «revendications» — c'est un «intérêt d'ordre juridique» qu'il exige, c'est-à-dire que l'Etat qui souhaite intervenir doit établir que l'intérêt qu'il invoque risque — et je cite votre jurisprudence — «d'être affecté par la décision» de la Cour comme le souligne à trois reprises l'arrêt du 13 septembre 1990 (*Rec.* 1990, pp. 116-117, pars. 57, 58 et 60). Et ceci ressort plus nettement du texte anglais de l'article 62 — qui parle de «an interest of a legal nature *which may be affected by the decision in the case*» —, alors que la version française omet cette précision; mais celle-ci n'est nullement contradictoire avec le texte français; elle l'éclaire et elle l'explique.

C'est du reste en combinant les deux versions que, dans l'affaire de l'intervention de l'Italie dans *Libye/Malte*, la Cour a rappelé que, pour déterminer l'intérêt juridique de l'Etat qui intervient (ou qui prétend le faire),

> «il lui faut évaluer l'objet de la requête et la manière dont celui-ci correspond à ce qu'envisage le Statut. L'article 62 du Statut prévoit l'intervention d'un Etat qui estime avoir un intérêt d'ordre juridique susceptible d'être «affecté» par la décision en l'espèce ou d'être pour lui «en cause»; il envisage donc que l'objet visé par l'Etat intervenant soit d'assurer la protection ou la sauvegarde de son «intérêt d'ordre juridique» en empêchant qu'il soit «affecté» par la décision» (arrêt du 21 mars 1984, *C.I.J. Recueil 1984*, p. 18, par. 28).

Or ni les «préoccupations», ni les «revendications» des Philippines ne sont susceptibles d'être affectées par l'arrêt que la Cour rendra sur le fond de l'affaire que l'Indonésie et la Malaisie lui ont soumis.

Pour s'en assurer, il convient, comme la Cour l'a fait pour toutes les requêtes à fin d'intervention antérieures, de confronter «l'intérêt d'ordre juridique et … l'objet indiqué par l'Etat demandant à intervenir» à «la nature de l'objet de l'instance introduite» par les Parties au différend «principal» (cf. l'arrêt du 21 mars 1984 relatif à la *requête en intervention de l'Italie* dans l'affaire du *Plateau continental Libye/Malte*, *C.I.J. Recueil 1984*, p. 19, par. 29). Cela ressort avec une netteté particulière de l'arrêt du 13 septembre 1990 dans lequel la Chambre de la Cour a examiné successivement

> «l'effet que chacune de ses éventuelles décisions relatives aux différents points susceptibles d'être tranchés peut avoir sur les intérêts juridiques invoqués par le Nicaragua, afin de définir la portée de toute intervention qui pourrait être jugée justifiée au regard de l'article 62 du Statut» (*C.I.J. Recueil 1990*, p. 116, par. 57).

Il va de soi, que, comme le rappelle avec fermeté l'arrêt de 1984 relatif à l'intervention de l'Italie dans *Libye/Malte*, «la portée des décisions de la Cour est définie par les prétentions et conclusions des Parties» (*C.I.J. Recueil 1984*, p. 19, par. 29), en l'espèce donc cette portée est définie par le compromis du 31 mai 1997, dont l'article 2 définit, on ne peut plus clairement, l'objet du litige :

> «La Cour est priée de déterminer, sur la base des traités, accords et de tout autre élément de preuve produit par les Parties, si la souveraineté sur Pulau Ligitan et Pulau Sipadan appartient à la République d'Indonésie ou à la Malaisie.»

C'est donc par rapport à cet objet, auquel les conclusions des Parties se tiennent très strictement, qu'il faut déterminer si les Philippines sont fondées à se prévaloir d'un intérêt juridique susceptible d'être affecté par la décision à intervenir en ce qui concerne aussi bien les «préoccupations» dont elles font état au sujet des traités, accords et autres éléments de preuve que leurs revendications sur la partie septentrionale de Bornéo.

J'aborderai chacun de ces deux points successivement bien qu'il m'ait semblé, en écoutant les plaidoiries d'hier, que les Philippines se polarisaient maintenant exclusivement sur le premier mais elles n'ont pas formellement abandonné le second.

Aussi bien sous la rubrique relative à son «intérêt d'ordre juridique» que dans celle portant sur l'«Objet de la requête à fin d'intervention», la République des Philippines insiste sur son objectif fondamental qui est

> «[p]remièrement, de préserver et sauvegarder les droits d'ordre historique et juridique du Gouvernement de la République des Philippines qui découlent de la revendication de possession et de souveraineté que ce gouvernement forme sur le territoire du Bornéo septentrional...» (requête, par. 5 *a)*, p. 5).

Comme l'a indiqué l'agent de l'Indonésie il y a un instant, le pays que j'ai l'honneur de représenter n'entend pas se prononcer sur le différend qui oppose les Philippines à la Malaisie. A cela, il y a deux raisons, qui sont d'ailleurs étroitement liées.

En premier lieu, l'Indonésie n'est absolument pas concernée par ce différend, ancien et récurrent, qui met aux prises épisodiquement la Malaisie et les Philippines. En second lieu et par voie de conséquence, ce litige «malaiso-philippin» n'a et ne peut avoir aucune incidence sur le différend dont vous avez été saisis sur la base du compromis du 31 mai 1997 entre l'Indonésie et la Malaisie — et réciproquement : votre décision ne peut porter atteinte à aucun intérêt d'ordre juridique qui pourrait exister dans le chef des Philippines.

Toute intervention, comme l'a rappelé la Cour dans son arrêt du 13 juin 1951 (préc.), «est un incident de procédure; par conséquent, une déclaration déposée à des fins d'intervention ne revêt, en droit, ce caractère que si elle a réellement trait à ce qui est l'objet de l'instance en cours» (*C.I.J. Recueil 1951*, p. 76). Tel n'est pas le cas de la requête que les Philippines vous ont soumise en ce qui concerne leurs prétendus «droits d'ordre historique et juridique» sur ce qu'elles appellent le Bornéo septentrional. Quand je dis «prétendus droits», Monsieur le président, je n'entends porter aucun jugement au fond sur ceux-ci : je le répète, l'Indonésie estime n'avoir pas à se prononcer sur un différend auquel elle n'est ni partie présente ni directement intéressée.

Toutefois, en disant cela, je dis, du même coup, que c'est un litige entièrement différent de celui qui a été soumis à la Cour par le compromis de 1997 que la République des Philippines entend porter devant votre Haute Juridiction. Or ceci ne saurait être ni l'objet ni l'effet d'une intervention.

Il suffit à cet égard de citer, mais assez longuement, l'arrêt de la Chambre de 1990 rendu à propos de l'intervention du Nicaragua dans le *Différend frontalier* entre El Salvador et le

Honduras, qui lui-même se réfère à votre jurisprudence antérieure : «le rôle de l'intervention n'est aucunement d'obtenir que soit tranché un autre différend entre l'Etat demandant à intervenir et l'une des parties ou les deux.» (*C.I.J. Recueil 1990*, p. 114-115, par. 51). Et, plus loin, toujours dans l'arrêt de 1990, la Chambre, mettant les points sur les «i» ajoute :

> «Le but d'une intervention fondée sur l'article 62 du Statut est de protéger un «intérêt d'ordre juridique» d'un Etat susceptible d'être affecté par une décision, dans une affaire pendante entre d'autres Etats, à savoir les parties à cette affaire. Son but n'est pas de mettre l'Etat intervenant en mesure de greffer une nouvelle affaire sur la précédente, de devenir une nouvelle partie et d'obtenir ainsi que la Cour se prononce sur ses propres prétentions. Une affaire avec une nouvelle partie et de nouvelles questions à trancher serait une affaire nouvelle. La différence entre l'intervention en vertu de l'article 62 et la constitution d'une nouvelle partie n'est pas seulement une différence de degré; c'est une différence de nature. Comme la Cour l'a relevé en 1984 :
>
> > «Rien dans l'article 62 n'indique que ce texte ait été conçu comme un autre moyen de saisir la Cour d'un litige supplémentaire — matière qui relève de l'article 40 du Statut — ou comme un moyen de faire valoir les droits propres d'un Etat non partie à l'instance.» (*Plateau continental (Jamahiriya arabe libyenne/Malte), requête à fin d'intervention, C.I.J. Recueil 1984*, p. 23, par. 37.)»
>
> (arrêt du 13 septembre 1990, affaire du *Différend frontalier terrestre, insulaire et maritime, requête du Nicaragua à fin d'intervention, C.I.J. Recueil 1990*, p. 133-134, par. 97).»

J'arrête là cette longue citation, Monsieur le président. Mais il n'y a pas grand-chose à y ajouter.

Pas plus que les Parties elles-mêmes ne peuvent, par la modification de leurs conclusions initiales ou l'adjonction de conclusions nouvelles transformer un différend porté devant la Cour «en un autre différend dont le caractère ne serait pas le même» (*Société commerciale de Belgique, C.P.J.I. série A/B n° 78*, p. 173; voir aussi, par exemple, *Certaines terres à phosphates à Nauru, exceptions préliminaires, C.I.J. Recueil 1992*, arrêt du 26 juin 1992, p. 266, par. 69), pas davantage un Etat désireux d'intervenir ne saurait opérer une telle novation. Comme la Chambre de la Cour l'a souligné une fois de plus, toujours dans son arrêt de 1990, l'intervention est une procédure *incidente*; or,

> «[p]ar définition, les procédures incidentes sont celles qui surviennent incidemment au cours d'une affaire déjà portée devant la Cour ou une chambre. Une procédure incidente ne saurait être une procédure qui transforme cette affaire en une affaire différente avec des parties différentes» (*C.I.J. Recueil 1990*, p. 134, par. 98).

Il va de soi que ces considérations s'imposent tout particulièrement lorsque, comme en l'espèce, l'Etat intervenant ne se prévaut d'aucun «lien juridictionnel» avec les Parties au différend et proclame haut et fort son intention de ne pas y devenir partie et de ne pas être lié par l'arrêt à intervenir : cela reviendrait à faire trancher par la Cour un différend autre que celui qui lui est soumis avec force obligatoire pour les Parties à celui-ci et non pour l'Etat intervenant. Avec, en l'espèce, l'incongruité supplémentaire que l'une des Parties au litige principal n'est pas concernée par le différend que les Philippines souhaiteraient greffer sur l'instance...

Or tel serait le cas si leur intervention était admise.

Selon la célèbre définition donnée par la Cour permanente dans l'affaire *Mavrommatis* : «Un différend est un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'intérêts entre deux personnes.» (*C.P.J.I. série A n° 2*, p. 11). Donc, un différend se caractérise d'abord par

— les Parties qu'il oppose — or celles qui sont parties à celui défini par le compromis sur la base duquel vous êtes saisis ne sont pas les mêmes que les parties qui sont en désaccord sur le problème soulevé par l'intervention; ce sont l'Indonésie et la Malaisie dans le premier cas, la Malaisie et les Philippines dans le second; les plaidoiries d'hier sont du reste parlantes à cet égard : sans doute les conseils des Philippines ont-ils dit quelques mots des observations de l'Indonésie, mais le cœur n'y était visiblement pas et au-delà de ce désintérêt poli, c'est à la Partie malaisienne et à elle seule qu'ils se sont adressés; un différend se caractérise ensuite par

— les thèses juridiques ou les intérêts en présence — or, ici non plus, ils ne coïncident pas, ne fût-ce que parce que l'Indonésie n'a ni thèse ni intérêt en ce qui concerne la souveraineté sur le nord de Bornéo alors qu'elle en a, de très précis, en ce qui concerne la souveraineté sur Pulau Ligitan et Pulau Sipadan; enfin et surtout, un différend se caractérise par

— son objet («un point de droit ou de fait») — or il est patent que l'objet du différend dont vous êtes saisis, Madame et Messieurs les juges, et celui au sujet duquel les Philippines prétendent vous «informer» sont entièrement différents : l'un porte sur la souveraineté sur Ligitan et Sipadan; l'autre sur la souveraineté sur le nord de Bornéo.

Et il n'est même pas possible de prétendre que le premier serait un élément du litige plus vaste constitué par le second. Outre que les Parties et les intérêts en présence ne sont pas les mêmes, les Philippines, avec honnêteté et netteté, ont écrit, dans une note de l'ambassade des Philippines à Djakarta adressée le 5 avril dernier au département des affaires étrangères indonésien :

> "the Government of the Republic of the Philippines wishes to reassure the Government of the Republic of Indonesia that *it does not have any* territorial interest on Sipadan and Ligitan" (note n° 147.01, reproduite en annexe aux observations de la République d'Indonésie sur la requête en intervention des Philippines; les italiques sont de nous).

Voici, Monsieur le président, qui dispose de la question.

Il est à peine besoin de rappeler qu'«[i]l est reconnu que des déclarations revêtant la forme d'actes unilatéraux et concernant des situations de droit ou de fait peuvent avoir pour effet de créer des obligations juridiques» (*C.I.J. Recueil 1974, arrêts du 20 décembre 1974*, affaires des *Essais nucléaires*, p. 267, par. 43 et p. 472, par. 46).

La République des Philippines ne pourrait, sans manquer à la bonne foi, dire devant vous aujourd'hui le contraire de ce qu'elle a assuré formellement à l'Indonésie il y a à peine un mois et demi, en relation avec l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan*, expressément mentionnée dans la note du 5 avril. Bien que les mystères de l'*estoppel* échappent largement au juriste latin que je suis, il me semble qu'il y aurait là un cas typique dans lequel toutes les conditions seraient réunies pour faire application de cette institution étrange, aussi sophistiquée soit-elle.

Du reste, force est de reconnaître que, non seulement les Philippines ne se sont pas dédit, mais qu'elles ont, je dirais presque «crânement», réaffirmé sans ambiguïté leur position :

— «our interest is not the islands that are in dispute before you» (CR 2001/1, 25 juin 2001, p. 17, par. 2 (M. Reisman));

— «... the Philippines is not interested in the outcome of Ligitan and Sipadan» (*ibid.*, p. 30, par. 43 (M. Reisman)).

Les choses sont donc on ne peut plus claires : les Philippines, qui sont liées par ces déclarations, ne revendiquent aucune souveraineté territoriale sur Pulau Ligitan et Pulau Sipadan. Or c'est là l'unique objet de l'affaire que la République d'Indonésie et la République de Malaisie vous ont soumise. On ne voit pas, dans ces conditions, comment elles pourraient se prévaloir d'un intérêt d'ordre juridique qui serait pour elles en cause dans cette affaire : elles ont formellement affirmé n'en avoir point.

Et il y a autre chose.

Comme l'a relevé la Cour en 1981 :

> «Autoriser une telle «intervention» [la Cour met le mot entre guillemets] dans les circonstances particulières de l'espèce laisserait de surcroît les Parties dans l'incertitude sur le point de savoir si, et dans quelle mesure, elles doivent considérer leurs propres intérêts juridiques vis-à-vis de Malte comme faisant partie en réalité de l'objet de la présente instance.» (Affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne), C.I.J. Recueil 1981*, p. 20, par. 34.)

c'est aussi la situation qui résulterait de l'intervention des Philippines en l'espèce : l'Indonésie et la Malaisie devraient discuter des droits invoqués par l'intervenant; elles seraient liées par l'arrêt à intervenir; mais les Philippines, protégées par l'article 59, ne le seraient pas et demeureraient libres de maintenir leurs revendications.

Au surplus, la Cour elle-même se trouverait inévitablement dans un grand embarras : elle devrait se prononcer sur les intérêts d'ordre juridique d'une non-partie. C'est la voie dans laquelle elle a refusé de s'engager en 1981 puis en 1984. Dans le premier cas, elle a rejeté l'intervention de Malte qui voulait intervenir «en tant que participant intéressé de près au procès et tenant à ce que ces problèmes soient résolus de la manière qui lui serait la plus favorable, mais sans assumer les obligations d'une Partie au sens du Statut et en particulier de l'article 59...» (*ibid.*, p. 18, par. 32). De même, dans le second cas, elle a refusé à l'Italie le droit d'intervenir car sa requête avait pour effet pratique inéluctable d'inviter la Cour à reconnaître [ses droits] et, pour ce faire, à statuer au moins partiellement sur les différends entre l'Italie et l'une des Parties ou les deux» (affaire du *Plateau continental (Jamahiriya arabe libyenne/ Malte)*, arrêt du 21 mars 1984, *C.I.J. Recueil 1984*, p. 19, par. 29; voir aussi, à peu près dans les mêmes termes, p. 20, par. 31). Et même dans l'arrêt de 1990, le seul qui a l'heur de retenir l'attention des avocats des Philippines, la Chambre a fermement maintenu que la requête du Nicaragua ne pouvait être interprétée comme équivalant à chercher à obtenir une décision judiciaire sur les propres demandes du Nicaragua (*C.I.J. Recueil 1990*, p. 131, par. 92) et qu'«[u]ne affaire avec une nouvelle partie et de nouvelles questions à trancher [et il y aurait bien l'une et les autres en l'espèce] serait une affaire nouvelle...

L'intervention ne peut avoir été conçue pour qu'on s'en serve à la place d'une procédure contentieuse» (*ibid.*, p. 134, par. 97 et 99).

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Mais, malgré leur répugnance à invoquer la jurisprudence de la Cour, les représentants des Philippines sont évidemment conscients de ces obstacles, sur lesquels les précédents qu'ils préfèrent ne pas mentionner jettent une lumière particulièrement crue. Aussi bien, comme je l'ai relevé tout à l'heure, semblent-ils placer tous leurs espoirs non plus sur le premier des «éléments d'intérêt» que mentionne la requête à fin d'intervention, mais sur le deuxième. Faute de persister à demander à la Cour de sauvegarder, d'une manière générale, les droits que les Philippines prétendent avoir sur la partie septentrionale de Bornéo, ils «braquent le projecteur» sur les traités et accords qui seraient en cause et tentent d'obtenir une translation des problèmes de fond posés par les revendications philippines vers des questions de nature exclusivement procédurale.

A cet égard, j'ai relevé des nuances, pour dire le moins, entre la présentation de cet «élément d'intérêt» que donne la requête et celle qui a été faite hier par les avocats des Philippines, même si l'essence de l'argument demeure le même : les Philippines auraient un intérêt juridique à informer la Cour (dont ce serait aussi l'intérêt — cf. CR 2001/1, 25 juin 2001, p. 20, par. 7 et 9 (M. Reisman)) au sujet de leur position sur les traités et accords pertinents, que — et c'est la nouveauté d'hier — nos amis philippins se plaignent de ne pas connaître, ce qui ne manque pas d'un certain piquant !

Il me semble qu'il est préférable de distinguer les deux aspects.

Et d'abord le problème de fond : un Etat peut-il intervenir dans une affaire pour informer la Cour de ses positions, non pas sur la substance même du différend dont elle est saisie, mais sur l'interprétation qu'il conviendrait de donner, selon lui, du droit applicable (en l'espèce, si nous avons bien compris, le droit conventionnel) ? Ici encore, la jurisprudence de la Cour, négligée par les Philippines, se révèle riche d'enseignements.

On pense, inévitablement, à la tentative d'intervention de Malte dans l'affaire du *Plateau continental (Tunisie/Libye)*. Dans cette affaire, pour reprendre les termes de l'arrêt de 1981, «[l]'intérêt juridique que Malte [disait] posséder et qui [aurait été] pour elle en cause dans l'affaire *Tunisie/Libye* [était] celui que [présentaient] de son point de vue les principes et règles régissant la détermination des limites de son plateau continental» (*C.I.J. Recueil 1981, arrêt du 14 avril 1981*, p. 8, par. 13).

Dans son arrêt du 14 avril 1981, la Cour a reconnu «que Malte ne [fondait] pas sa demande sur un simple intérêt à l'égard des prononcés de la Cour concernant les principes et règles de droit international applicables à titre général» (*ibid.*, p. 17, par. 30) et que Malte possédait «un certain intérêt qui est sensiblement plus spécifique et plus direct que celui des Etats étrangers à la région» (p. 19, par. 33). Mais, tout en «comprenant» les préoccupations de Malte (p. 20, par. 35), la Cour n'en a pas moins, à l'unanimité, rejeté sa requête, ce qui indique bien qu'un Etat ne saurait se voir reconnaître le droit d'intervenir au seul prétexte de son «intérêt» à l'égard du droit applicable.

Le précédent est d'autant plus impressionnant que, dans cette affaire, la Libye et la Tunisie ne demandaient pas à la Cour de procéder à une allocation de territoires ou à une délimitation de leurs plateaux continentaux respectifs, mais seulement de déterminer , «[q]uels principes et règles du droit international peuvent être appliqués pour la délimitation de la zone du plateau continental» relevant de chacune des Parties (article premier du compromis). L'intervention ne pouvait donc porter que sur l'interprétation du droit applicable dans les circonstances de l'espèce. Elle a été rejetée à l'unanimité.

L'arrêt de 1990 concernant l'intervention du Nicaragua dans l'affaire *El Salvador/Honduras* est encore plus net en ce sens : se fondant sur le précédent de 1981, la Chambre y estime «qu'un intérêt d'un Etat tiers pour des règles et principes juridiques généraux pouvant être appliqués par la décision» ne peut justifier une intervention (*C.I.J. Recueil 1990, arrêt du 13 septembre 1990*, p. 124, par. 76; voir aussi p. 126, par. 82).

Il ne suffit donc certainement pas que les Philippines soient «préoccupées» (*concerned*) par les traités, accords et autres éléments de preuve que les Parties ont pu produire, pour qu'elles aient établi l'existence d'un intérêt juridique pour elles en cause, susceptible d'être affecté par le futur arrêt de la Cour.

Sans doute, allez-vous vous fonder, Madame et Messieurs de la Cour, sur certains traités, accords ou documents qui peuvent «intéresser» les Philippines d'une manière ou d'une autre. Mais votre décision n'affectera en aucune manière les droits que ce pays pourrait, éventuellement, ti de ces traités; pas davantage que la détermination des principes et règles du droit international applicables à la délimitation du plateau continental entre la Libye d'un côté, la Tunisie ou Malte de l'autre, n'a semblé de nature à mettre en cause les intérêts, respectivement de Malte et de l'Italie, dans les affaires tranchées en 1981 et 1984 — alors même, je le répète, que, dans les deux cas, cette détermination des principes et des règles applicables était l'objet même du différend en cause.

Du reste, comme l'Indonésie l'a constamment soutenu, et comme la Malaisie semble maintenant s'en apercevoir, la réponse à la question posée à la Cour par le compromis repose entièrement «on the interpretation of the Convention of 20 June 1891, concluded by Great Britain and the Netherlands. Spain was not a party to the Convention. The Convention is *res inter alios acta* as far as the Philippines is concerned» (observations de la Malaisie, par. 24, p. 10; voir aussi p. 14, par. 37). Les Philippines sont donc doublement «protégées» si je peux dire : par l'article 59 du Statut de la Cour d'une part; par le principe fondamental de l'effet relatif des traités d'autre part. Peut-être même triplement puisque l'interprétation que vous êtes appelés à donner de cette convention, Madame et Messieurs de la Cour, ne concerne que son application à Ligitan et Sipadan — il n'existe pas de différend entre l'Indonésie et la Malaisie quant à son application à l'île de Bornéo. Comme les Philippines limitent leur intérêt à l'île de Bornéo et en excluent expressément Ligitan et Sipadan, elles sont, en quelque sorte, protégées aussi par le *petitum* tel qu'il est défini par le compromis

En tout état de cause, il ressort de la jurisprudence claire et fortement fondée de la Cour que l'«intérêt» dont font état les Philippines pour les traités, accords et autres éléments de preuve fournis par les Parties n'est pas de ceux qui pourraient justifier une intervention en vertu de l'article 62 du Statut.

Ici encore, les Philippines semblent s'être aperçues du problème et leur équipe de plaidoirie a tenté de contourner la question en se plaçant sur le terrain de la procédure, au risque de cultiver une thèse quelque peu paradoxale. En substance, les avocats des Philippines sont venus vous expliquer :

> «Nous avons beaucoup de choses à vous dire sur les traités et accords invoqués par les Parties, mais nous ne savons pas quels sont ces traités et accords car la décision de la Cour de ne pas nous communiquer les pièces de procédure nous a privés de la

possibilité d'en prendre connaissance...» (CIJ, CR 2001/1, p. 17, par. 2; p. 18, par. 3 (M. Reisman).)

En réalité, ce dont se plaignent les Philippines, c'est du Statut et du Règlement de la Cour.

Aux termes de l'article 62 du Statut un Etat peut demander à intervenir s'il estime qu'un intérêt juridique est pour lui en cause, étant entendu que l'article 43 ne prévoit la communication des pièces de procédure écrite que «à juge et à parties». Bien que cela n'aille peut-être pas de soi, l'article 53 du Règlement assouplit néanmoins la rigueur de cette dernière disposition en prévoyant que la Cour ou son président «peut à tout moment décider, après s'être renseignée auprès des parties, que des exemplaires des pièces de procédure et des documents annexés seront tenus à la disposition de tout Etat admis à ester devant elle et ayant demandé à en avoir communication». En l'espèce, suivant l'avis des Parties, la Cour n'a pas usé de cette faculté; pour sa part, comme Monsieur l'ambassadeur Wirajuda l'a indiqué tout à l'heure, l'Indonésie a considéré que cette demande était tardive et risquait d'ouvrir la porte à une intervention inappropriée.

En se présentant maintenant devant vous sous couvert d'une requête à fin d'intervention et en formulant à nouveau la même demande, les Philippines font, en quelque sorte, appel de la décision de non-communication des pièces de procédure. Elles ne s'en cachent d'ailleurs pas : le professeur Reisman n'hésite pas à parler de «déni de justice» (CR 2001/1, p. 22, par. 16 et p. 23, par. 17 et 18) pour justifier ce recours d'un type nouveau (voir aussi p. 31-32, par. 47).

Or, non seulement un tel appel n'est nullement prévu dans les règles régissant la procédure, qu'il revient à tourner, mais encore, c'est le système même de la confidentialité de la procédure et celui de l'intervention qui se trouvent ainsi remis en cause.

L'article 62 du Statut ne prévoit aucun équivalent du mécanisme d'«alerte» retenu à l'article 63. Et pour une excellente raison : alors que l'intervention de l'article 63 est expressément prévue pour garantir l'interprétation uniforme des conventions multilatérales pouvant être invoquées par les Parties (il s'agit donc des *moyens* sur lesquels celles-ci se fondent), au contraire l'intervention de l'article 62 n'est recevable que si elle coïncide avec l'*objet* du différend tel qu'il ressort de la requête ou du compromis (l'une et l'autre étant rendus publics conformément aux dispositions de l'article 40). Ici, les moyens par lesquels les Parties tentent d'établir leurs droits ne sont pas en cause.

Il résulte du système de communication des pièces et d'intervention des articles 53 du Règlement et 62 du Status qu'il appartient à une partie d'apprécier son intérêt éventuel à fin d'intervention en fonction de l'objet du différe[illegible]el qu'il ressort de la requête ou du compromis. Au vu de ce document, elle peut décider d'intervenir. C'est le schéma contraire que vous proposent les Philippines : «je ne suis pas sûr», disent-elles, «que j'ai un intérêt; et j'interviens pour le vérifier».

La «curiosité» que peut manifester un Etat vis-à-vis des positions des Parties en procédure ne constitue pas un intérêt juridique et ne peut pas fonder un droit à intervenir. De même, comme l'explique l'ambassadeur Rosenne, ««interest» in the development of the law, that is «interest» amounting to «curosity», *per se* is not to be regarded as an interest of a legal nature which might be affected by the decision in a case, sufficient to support a request for permission to intervene...» (*Intervention in the International Court of Justice*, Nijhoff, Dordrecht/Boston/London, 1993, p. 32-33).

Les Philippines nous disent ne pas être intéressées par l'objet même du litige, ce qui suffit à disqualifier leur intervention. Elles nous disent aussi, en revanche, qu'un intérêt est pour elles en cause, du fait de certains traités et accords et elles affectent de ne pas savoir lesquels. Ceci aussi d'ailleurs fait peser un doute sérieux sur la solidité de leur démarche. Mais, en tout état de cause, le fait est qu'elles ont longuement cité et commenté tous les traités et accords qui leur semblent (c'est leur appréciation subjective) pouvoir poser problème. Tel a été l'objet de toute la plaidoirie du professeur Magallona hier matin, qui a exposé les préoccupations de l'Indonésie à leur égard — y compris en ce qui concerne la convention anglo-néerlandaise de 1891 (CR 2001/1, 25 juin 2001, p. 44-48). Les Philippines ont donc largement – plus que largement, à mon sens – atteint leur but.

Au demeurant, ceci ne revient pas à dire que les prises de position formelle des Philippines soient sans incidence pour l'affaire qui nous occupe — ou qui devrait nous occuper — exclusivement. Et c'est l'un des points que M. Bundy va évoquer dans quelques instants. En ce qui me concerne, il suffit de constater que même si, comme l'Indonésie vous le demande, vous refusez, Madame et Messieurs les juges, à la République des Philippines le droit d'intervenir, sa requête n'aura pas moins atteint ses buts : comme Malte dans *Tunisie/Libye*, comme l'Italie dans *Libye/Malte*, elle aura — elle a déjà ! — exposé les vues qui lui paraissent nécessaires sur les traités présentant, à ses yeux, un intérêt dans son différend avec la Malaisie — traités qu'elle connaît évidemment, sans avoir besoin de se référer aux pièces de procédure écrites — si bien que l'on voit mal, de toute manière ce qu'une intervention en bonne et due forme pourrait lui apporter de plus.

Ce n'est peut-être pas très recommandable — car cela relève typiquement de l'intervention politique ou médiatique, celle-là même que l'article 62 du Statut s'est efforcé d'empêcher ou de limiter, comme le montrent avec netteté les travaux préparatoires de cette disposition (voir Shabtai Rosenne, *Intervention in the International Court of Justice*, Nijhoff, Dordrecht/Boston/London, 1993, not. p. 25 et 32). Mais c'est bien ainsi, qu'on le veuille ou non, que se présentent inévitablement les audiences de cette semaine, malgré la très grande modération dans le ton dont ont fait preuve l'agent et les conseils des Philippines hier. Et, en dépit de toutes les précautions oratoires qu'ils ont prises pour ne pas donner l'impression d'avoir utilisé le précieux *forum* de votre Cour pour exposer leur affaire contre la Malaisie (voir par exemple CR 2001/1, p. 17 (M. Bello); p. 18, par. 2; p. 27, par. 29 (M. Reisman); p. 33 (M. Magallona)), ce n'est pas moins ce qu'ils ont fait hier.

J'en ai terminé et je vous remercie bien vivement, Madame et Messieurs les juges, de l'attention que vous m'avez prêtée. Je vous prie, Monsieur le Président, de bien vouloir appeler M. Bundy à cette barre.

Le PRESIDENT : Je vous remercie, Monsieur le professeur, et je donne maintenant la parole à M. Rodman Bundy. You have the floor Mr. Bundy.

Mr. BUNDY: Merci bien Monsieur le Président. Mr. President, Members of the Court: it is, as always, a great honour to appear before you.

## Introduction

My task this morning, following Professor Pellet, is to address — and I assure you to address very briefly — two matters that have not been treated by Professor Pellet. The first concerns the untimely nature of the Philippines Application. The second concerns certain implications that the Application has for the case on the merits as between Indonesia and Malaysia.

Now while my comments on the first part of my presentation will focus on the repercussions which flow from the unusual lateness of the Philippines Application, on the second point — that is on the implications of the Application for the case on the merits — it will be necessary for me not simply to refer to issues raised by our colleagues from the Philippines, but also to points raised by Malaysia in their written observations. While Malaysia and Indonesia have each objected to the Philippines Application, that does not mean, Mr. President, that we share all of the views expressed by our Malaysian colleagues. Since time is short, let me turn directly to my first point.

## 1. The untimely nature of the Philippines Application

The Court will, of course, be well versed in the formal requirements imposed by Article 81 of the Rules. Paragraph 1 of Article 81 stipulates that an application for permission to intervene "shall be filed as soon as possible, and not later than the closure of the written proceedings". The distinguished Agent of the Philippines referred to this Article yesterday in his presentation. But I was struck by the fact that the Agent did not think it necessary to refer to that part of Article 81, paragraph 1, which stipulates that an application "shall be filed as soon as possible". The Agent preferred, for obvious reasons, to limit his remarks to the provision that an application must be filed no later than the closure of the written proceedings (CR 2001/1 p. 16).

The Court is well aware that the Application itself was filed on 13 March of this year, that was 11 days after the Parties had filed their third and final round of written pleadings with the Court. In Indonesia's view, this fact alone gives rise to a serious question as to the admissibility of the Philippines Application quite apart from the substantive defects that Professor Pellet has exposed.

As Indonesia's Agent has recalled, the case between Indonesia and Malaysia has been public knowledge for some time.

The Special Agreement was signed *four years ago* on 31 May 1997. Already at that time, the Philippines, as a neighbouring State in the region, would have been on notice that Indonesia and Malaysia intended to submit their dispute over Ligitan and Sipadan to this Court. In May 1998 — three years ago — the Special Agreement was registered with the United Nations. At that point, even if it had not already been known to the Philippines, the Special Agreement was a matter of public knowledge to the international community as a whole. On 2 November 1998, the Special Agreement was notified to the Court and the time-limits provided for in the Special Agreement for the filing of written pleadings began to run from that date.

The Special Agreement provided for three mandatory rounds of simultaneous written pleadings to be exchanged by the Parties. Accordingly, the Parties filed their Memorials on 2 November 1999, their Counter-Memorials on 2 August 2000, and their Replies on 2 March this year. Throughout this period, the Philippines never once intimated, much less claimed, that it had any interest of a legal nature which could be affected by a decision in the case. As I have explained, the Application itself was filed 11 days *after* the Parties had deposited their Replies.

The Parties having undertaken to submit three rounds of written exchanges, it must have been apparent, as in fact the Philippines Agent acknowledged yesterday, that a fourth round of written pleadings in the case was extremely unlikely (CR 2001/1, p. 16). So the Philippines was well aware of the fact that there was a very strong likelihood that the Replies of the Parties filed on 2 March this year would be the last written pleadings in the case and that the case would thereafter be ripe for oral proceedings.

Quite remarkably, despite knowing that this 2 March 2001 deadline would, in all likelihood, represent the final written phase of the case, the Philippines remained silent. It did so, I would suggest, at its own risk.

In the light of this procedural history, there can be no pretension that the Application has been filed "as soon as possible". Nor has the Philippines provided any credible explanation as to why it could not have filed its Application much earlier, and in any event prior to the deadline for the submission of Replies.

The distinguished Agent of the Philippines yesterday stated that, shortly after the notification of the Special Agreement was made to the Court, his Government began to undertake a study which looked into the question of how the dispute might affect the national interests of the Philippines (CR 2001/1, p. 16). Surely, the Philippines did not need 28 months to complete that study. Nothing, I would suggest, prevented the Philippines at a relatively early stage after the notification of the Special Agreement from concluding that, as a precautionary measure, it should apply to intervene.

Professor Reisman attempted to explain away the Philippines delay, but, with respect, I did not find that explanation convincing. His argument was that the Philippines had to ask itself whether some or all of the treaties and agreements, which may have been referred to in the Special Agreement between Indonesia and Malaysia, might also be related to the Philippines claim to North Borneo. To this end, Professor Reisman explained, the Philippines eventually decided that it had to request copies of the Parties' pleadings pursuant to Article 53 of the Rules (CR 2001/1, p. 23).

Yet this request for the pleadings only came on 22 February this year, that was *eight days* before the Parties were due to file their Replies and well over two years after the Parties had filed their initial Memorials. Professor Reisman claimed that the Philippines could not usefully have requested the pleadings any earlier since, by that time, if they had requested them earlier most of the pleadings would not have been filed, so they had to wait until most of the pleadings in the case had been filed. Hence the delay in requesting the documents and, presumably, hence the delay in submitting the Application (CR 2001/1, p. 23).

That argument simply does not hold water. There was no need for the Philippines to wait until most of the pleadings had been submitted, until a mere eight days before the Replies were due, to ask for copies. Article 53 of the Rules of Court states that the Court may, *"at any time"*, decide to make the pleadings and documents available to a State which has asked for them: and the Philippines could readily have submitted its request for the pleadings back in 1999 when the Parties filed their Memorials. Had that request been granted, the Philippines would obviously have been given subsequent pleadings as well. Had the request been denied, the Philippines would have known where it stood and certainly would have been in no worse position than it finds itself now.

In this respect I suggest that it is significant that Article 81, paragraph 1, of the present Rules of Court, which is the 1978 version of the Rules, incorporated an important amendment from the previous 1972 version. The 1972 Rules had provided that an application for permission to intervene under Article 62 of the Statute should be filed at the latest "before the commencement of the oral proceedings". The present Rules have replaced those words "before the commencement of the oral proceedings", with the words "not later than the closure of the written proceedings". It can thus be seen that the current Rules were designed to place a more restrictive time-limit on a party wishing to apply to intervene than had previously existed. Indonesia believes that this change in the Rules should be given a practical effect in considering the timeliness of the Philippines Application.

Finally, on this point, Mr. President, even if it could be maintained that the Application is not inadmissible due to its late filing, the fact that the Philippines waited so long to file its Application in my view undermines the credibility of the Philippines present claim that it has an interest of a legal nature which may be affected by a decision in the case. Had the Philippines genuinely thought that it had a legal interest which might be affected, surely it would have acted in a more expeditious manner.

### 2. Implications of the Application for the merits of the dispute between Indonesia and Malaysia

This brings me, Mr. President, to the second point I wish to raise, and that concerns certain implications of the Application for the merits of the case. I do not intend to trespass unduly onto the merits of the case, but there are a number of important ramifications which flow from the Application, and from Malaysia's reaction to it, which have a fundamental bearing on the question of sovereignty over Ligitan and Sipadan. Since Malaysia has alluded to some of these in its written observations, it is appropriate for Indonesia to state its views.

Put very succinctly, the position is as follows.

In its Application and again, yesterday, in its oral presentation, the Philippines emphasize that it possesses an historical claim to sovereignty over the territory of North Borneo (Application, para. 4 *(b)*; CR 2001/1, pp. 15 and 33). We have heard that that claim derives from the grant by the Sultan of Sulu to Messrs. Dent and Overbeck in 1878. The Philippines claim rests on the proposition that in effectuating that grant, it was simply a temporary lease that was given to Dent and Overbeck and not a grant of full sovereignty over North Borneo. Therefore, so the argument goes, title to North Borneo remains vested in the Philippines which is the successor in interest, in chronological order, to the Sultan of Sulu, Spain and the United States.

Yesterday, Professor Magallona informed the Court that the 1973 Philippines Constitution includes in its definition of Philippine territory, "all the other territories over which the Philippines has an historic right or legal title" (CR 2001/1, pp. 33-34).

At the same time, we know that the historic rights and titles of the Philippines do not extend to Pulau Ligitan or Pulau Sipadan. This was made very clear in the Note Verbale that was sent by the Philippines to Indonesia on 5 April this year (Ann. 1 to Indonesia's observations). It was also made very clear by Professor Reisman's remarks yesterday, when he reiterated that the Philippines does not lay claim to the islands (CR 2001/1, pp. 27 and 30).

It follows from this that, since the Philippines rights derive from those originally possessed by the Sultan of Sulu, the Philippines cannot consider that the Sultan of Sulu ever possessed any historic rights or titles over the islands of Sipadan and Ligitan. Otherwise, the Philippines would be claiming these two islands as part of the Sultan's historical domains. This is one of the reasons why the Philippines, in our view, has no interest of a legal nature in the actual subject-matter of the present dispute.

If we now turn to Malaysia's claim to Sipadan and Ligitan, that claim, as the Court will be aware, is based, very briefly, on the following alleged chain of title. First, Malaysia contends that the islands originally formed part of the Sultan of Sulu's domains and that these were then acquired by Spain in the mid-nineteenth century. Second, by a 1900 Treaty, Spain transferred its possessions in the area to the United States. Third, the United States, in turn, allegedly transferred its interests in the islands to Great Britain pursuant to the 1930 Anglo-United States Convention. Thereafter, Malaysia succeeded to the rights and interests of Great Britain upon achieving independence.

In so far as the Philippines, as the successor in interest to the Sultan of Sulu, does not maintain that the islands of Ligitan and Sipadan formed part of the Sultan's possessions, it is impossible to see how Malaysia can claim sovereignty over the islands on the grounds that the islands were once within the Sultan's domains. Malaysia's thesis is fundamentally contradicted by the presentation of the Philippines, as expressed yesterday and in its earlier Note Verbale.

In the light of the foregoing, it simply does not follow, as Malaysia asserts at paragraph 38 of its written observations that "the Philippines is one of many States which recognizes that the two islands are part of Sabah". For while the Philippines has made it clear that it does lay claim to Sabah, it has made it equally clear that it does not lay claim to the islands of Ligitan and Sipadan. And it follows that there is no way, from that logical sequence, that one can say that the Philippines recognizes that the islands are part of Sabah or that they belong to Malaysia. The position is exactly the opposite.

Malaysia is also quite wrong when it states at paragraph 47 *(a)* of its observations that if the Philippines has an interest of a legal nature in the present proceedings, "it must be to support Malaysia's claim". Professor Reisman noted yesterday that from the Philippines point of view, the Philippines simply does not understand what that means (CR 2001/1, p. 28). For my part, what I hope that I've shown is the fact that the Philippines does not claim sovereignty over either of the two islands that are actually the subject-matter of the present dispute, if anything, undermines the foundat[illegible] of Malaysia's case on the merits, since that case depends on the fact or the allegation that the Sultan did have sovereignty over the islands.

By the same token, Malaysia's argument expressed in paragraph 47 *(b)* of its written observations, and I quote, "A third State [these are Malaysia's words] should not be permitted to intervene, when its only legal interest can be to support the legal position of a party [Malaysia] which rejects its intervention", that argument also, I would suggest, is misguided. While Indonesia does not accept that the Philippines has demonstrated an interest of a legal nature which may be sufficient to justify its request to intervene, it certainly cannot be concluded, as Malaysia has attempted to do, that the only legal interest of the Philippines is to support Malaysia's case. It is, I would suggest, exactly the opposite, which is the situation.

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Mr. President, Members of the Court, I hope the Court will now appreciate why Indonesia does not necessarily share all of the views expressed by our Malaysian colleagues in their written observations, even though we do share Malaysia's view that the Application should be denied. That concludes my remarks, Mr. President, and it concludes Indonesia's first-round presentation. I am grateful for the patience and courtesy which the Court has afforded me and all of the members of the Indonesian team. Thank you very much, Mr. President.

**The PRESIDENT:** Thank you very much Mr. Bundy. Ceci, comme vous l'avez dit, termine le premier tour de plaidoiries de l'Indonésie. La séance est suspendue pour dix minutes.

*L'audience est levée de 11 h 25 à 11 h 35*

**Le PRESIDENT :** Veuillez vous asseoir. La séance est reprise et je vais donner immédiatement la parole à l'agent pour la République de la Malaisie, S. Exc. M. Tan Sri Abdul Kadir Mohamad. Monsieur l'agent, vous avez la parole.

**Mr. MOHAMAD:**

1. Mr. President, distinguished Members of the Court, it is a great honour to appear before you and to have the opportunity to explain Malaysia's opposition to the Application by the Philippines to intervene in the present case.

### The Philippine claim to Sabah is separate from the Indonesian claim to Ligitan and Sipadan

2. I will do so first by explaining some of the background to the two separate territorial disputes which concern the Malaysian State of Sabah.

3. The first dispute was raised by Indonesia in 1969. It concerns only the islands of Ligitan and Sipadan, lying off the east coast of Sabah. These two islands are the subject-matter of the Special Agreement of 31 May 1997 between Malaysia and Indonesia. They are the only subject-matter of the present case.

4. The second dispute was raised by the Philippines in 1962, and it concerns large areas of the State of Sabah. I say "large areas"; in fact we do not know how much because we have never been told. Indeed, as you saw from the map Mr. Magallona showed you yesterday, the Philippines cannot precisely define its claim to Sabah. Mr. Magallona showed it as a sort of coloured sphere. And that is the most precise we have ever seen it.

5. The crucial point about the Sabah claim is that it does not concern the two islands at all. The Philippines itself has made this quite clear in its letter to Indonesia dated 5 April 2001, which is before the Court. Counsel for the Philippines yesterday were also perfectly clear about it.

### There is no overlap between the Philippine claim and the Indonesian claim

6. These two disputes are quite separate and distinct. There is no overlap between them. There is accordingly no basis for the Philippines to intervene in the present case. It is as simple as that. My colleagues, Sir Elihu Lauterpacht and Professor Cot, will explain in more detail some of the legal reasons why this is so. I hope the Court will forgive me if I set out, first, some of the factual background.

### The Indonesian claim is limited to Ligitan and Sipadan

7. As to the Indonesian claim to Ligitan and Sipadan, the Court is now fully informed about this, and there is very little I need to say. Dating from 1969, the claim is based on the 1891 Convention between Britain and the Netherlands. By that Convention the Netherlands and Great Britain determined the boundary between the Dutch and British possessions in the island of Borneo. British North Borneo was by then a British Protectorate over which Spain had relinquished all claims. Later, Britain and the Netherlands further specified and modified the boundary between their respective possessions by further treaties of 1915 and 1928. Indonesia says the boundary extends as an allocation line 50 miles to the east of the island of Sebatik, giving Ligitan and Sipadan to Indonesia, as a successor State to the Netherlands. Malaysia disagrees. It is a very specific dispute, dependent essentially upon the meaning and effect of a convention between the two colonial Powers. Indonesia of course makes no claim to Sabah as such, or to any other part of Sabah than the two islands.

### The Philippine claim to Sabah has been rejected by the people of Sabah

8. The Philippines claim to Sabah dates from 1962. It was first made in the context of a campaign of opposition to the formation of the Federation of Malaysia. The Philippines said then that North Borneo would be unstable, that Malaysia would go communist, that the people of Sabah would be impoverished. I am pleased to inform the Court that all these predictions have been

**proved wrong. The people of Sabah, now over 2 million of them, enjoy a good standard of living under a stable and democratic federal system of government in which Sabah constitutes one of the 13 States of Malaysia.**

**9. In 1962, an election was held in North Borneo (and Sarawak) in which joining Malaysia was the key issue. The people decided by a substantial majority in favour of the pro-Malaysia party. A commission established by the then administering authority, Great Britain, reached the same conclusion. The Secretary-General of the United Nations confirmed it in 1963: he said there was "no doubt about the wishes of a sizeable majority of the peoples of these territories to join the Federation of Malaysia". Despite this clear verdict, for a time the Philippines maintained its claim to Sabah. It wanted its claim to the territory to override the wishes of the people. For the last ten years or more the Sabah claim has not been advanced at all; it has remained completely dormant.**

### The Philippines has no legal interest in the dispute over the Ligitan and Sipadan islands

**10. The two claims are in stark contrast with each other. The Indonesian claim is a claim to two small islands, based on a colonial treaty. The Philippines claim is a claim to a very large territory and its people, based on a different set of transactions. The 1891 Convention is irrelevant to the Philippines claim. Neither of the two parties to the 1891 Convention (Britain or the Netherlands) accepted that Spain in 1891 had any rights over North Borneo. The Philippines too, in its letter to Indonesia, has emphatically said that "it does not have any territorial interest on Sipadan and Ligitan islands". Thus the Philippines has no legal interest in the 1891 Convention and no territorial interest in the two islands which are the subject of the dispute between Indonesia and Malaysia. How, then, can it possibly have an interest of a legal nature in the present case? Malaysia submits that the answer is clear: the Philippines has no such interest.**

### In fact and in law, the Philippine claim to Sabah is totally lacking in foundation

**11. Mr. President, it was not the intention of Malaysia to dwell on the Philippine claim to Sabah at this time or before this Court. However, since the Agent and counsel for the Philippines spoke about it at length and made references in particular to the Sultanate of Sulu as a historical**

factor, Malaysia needs to take this opportunity to state categorically that, in fact and in law, the Philippine claim to Sabah is totally lacking in foundation.

12. As an international entity, the Sultanate of Sulu disappeared in September 1878 when Spain at last succeeded in conquering the Sultanate. It disappeared as a political entity within the Philippines in 1915. It disappeared as an entity of any kind whatever when the United States abolished the Sultanate entirely in 1936. Thereafter the private law heirs of the private property of the Sultan accepted money which had previously been paid to the Sultan. They did so pursuant to a judgment of the High Court of the State of North Borneo in 1938, which dealt with the legal situation following the final abolition of the Sultanate. That judgment made it clear that the right to the money had nothing whatever to do with any question of sovereignty.

13. Great Britain recognized Spanish sovereignty over the Sulu Archipelago in 1885. At the same time, Spain expressly renounced — and I quote — "as far as the British Government, all claims of sovereignty over the territories of the continent of Borneo, which belong, or which belonged in the past to the Sultan of Sulu". The validity of this transaction was expressly recognized by the United States, in its capacity as sovereign over the Philippines and as successor to Spain. Indeed, it did so twice: in the Exchange of Notes of 1907 and then in the 1930 Boundary Convention between the United States and Britain.

14. After 1878, neither the Sultan of Sulu nor his heirs had any capacity to hold or cede sovereignty or sovereign rights. The British Government expressly recognized this in the negotiations leading to the 1907 Exchange of Notes. The United States, then sovereign over the Philippines, agreed.

15. In fact, as I have said, the Sultanate of Sulu as an entity was abolished on the death of the last Sultan in 1936.

16. Mr. President, counsel yesterday used quite a lot of Latin. The basic idea of his Latin is that you cannot give what you have not got. Yet this idea completely disproves the Philippines' own claim. How could private persons, the private law heirs of the Sultan, hold sovereignty in 1962? Obviously they could not. Therefore they could not give it to the Philippines. This is just one difficulty. There are too many other difficulties with the Sabah claim to list them all here, and anyway, of course, that claim is irrelevant to the present case.

### Every country in the world, and the United Nations, recognize Sabah as part of Malaysia

17. To summarize, each of the treaties of 1885, 1907 and 1930 explicitly accepted that North Borneo was British territory, not Spanish, not American, and not Filipino. Nothing that private citizens did in 1962 could possibly have changed that. Now Sabah is indisputably Malaysian territory, recognized as such by every country in the world, and by the United Nations.

18. I might add, Mr. President, Members of the Court, that having heard Mr. Magallona, the Court is now sufficiently informed of the Philippine claim to avoid pronouncing upon it in the present proceedings. Not that this was ever necessary in order to resolve the dispute over the two islands, Ligitan and Sipadan.

### The Philippine Application to intervene is an untenable distraction

19. Mr. President, I have tried to be as objective and low-key as possible. It is well known that territorial disputes can arouse high emotions and give rise to great hostility. This is at least as true in Asia as it is elsewhere. Indeed, it is fair to say that there has been as yet hardly any tradition in Asia of solving territorial disputes by judicial means, such as resort to your honourable Court. The present case, which Malaysia and Indonesia have mutually agreed to bring to this Court, is almost the first example — certainly the first example in more than 40 years. Mr. President, permit me to express the hope that Malaysia and Indonesia will be allowed to deal with their bilateral dispute without the distraction of a third party making a claim to a much larger territory, a claim which expressly excludes the two islands which are in dispute between the Parties.

### For legal, factual and other reasons the Philippine request to intervene must be denied

Mr. President, distinguished Members of the Court:

20. For these reasons, as well as for the more specifically technical reasons which counsel for Malaysia will now set out, I would earnestly request this Court to deny the Philippines request to intervene. Such a denial will not affect the two islands, which the Philippines expressly does not claim. Nor will it affect the Philippines claim to the State of Sabah — for whatever that may be worth. The Philippines should not be allowed to abuse Article 62 as a platform to advance this claim. And let there be no doubt about this. It is the firm view of my country that, not merely has

the Philippines no right to intervene before the Court in the present case; it has no claim to make against Malaysia regarding Sabah. The future of the people of Sabah is non-negotiable.

21. In any event, the Sabah claim has nothing whatever to do with this specific territorial dispute with Indonesia, which my Government wishes to settle by peaceful means, and specifically though this honourable Court.

22. Mr. President, I would like now to ask you to call upon Professor Jean-Pierre Cot, who will address in more detail the question whether the Philippines has shown an interest of a legal nature in the dispute between Malaysia and Indonesia.

Mr. President, distinguished Members of the Court, I thank you for your attention.

The PRESIDENT: Thank you, Your Excellency. Je donne maintenant la parole au professeur Jean-Pierre Cot.

M. COT :

### Introduction

1. Monsieur le président, Madame, Messieurs de la Cour, permettez-moi d'abord de vous dire l'honneur et le plaisir que j'ai à retrouver ce prétoire, à retrouver cette barre pour défendre les positions de la Malaisie à propos de la requête à fin d'intervention des Philippines dans l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan*.

Monsieur le président, le Gouvernement des Philippines a-t-il établi l'existence d'un intérêt d'ordre juridique en cause pour lui en la présente instance ? Telle est la question — à vrai dire essentielle — qu'il me revient de traiter.

### La question du lien juridictionnel

2. Cependant, et à titre préliminaire, vous me permettrez d'évoquer la question dite du «lien juridictionnel».

3. Je le sais bien, vous l'avez rappelé récemment à propos de la requête à fin d'intervention de la Guinée équatoriale dans l'affaire de la *Frontière terrestre et maritime entre le Cameroun et le*

*Nigeria* : «L'existence d'un lien juridictionnel entre l'Etat qui demande à intervenir et les parties en cause n'est pas une condition du succès de sa requête.»[1]

4. Mais en l'espèce et dans le cas présent, je vous fais observer que le lien juridictionnel manque par deux fois.

Premièrement, il n'y a pas d'instrument conventionnel ou de déclaration unilatérale conférant à la Cour compétence pour connaître d'un litige territorial entre les Philippines et une des Parties en cause;

Deuxièmement, les deux Parties à l'instance s'opposent à la demande d'intervention des Philippines.

5. Je note en particulier que les Philippines, par leur déclaration facultative de juridiction obligatoire du 23 décembre 1971, ont explicitement exclu de la compétence de la Cour tout différend :

> «ayant pour cause ou concernant la juridiction ou les droits revendiqués ou exercés par les Philippines
>
> i) ...
>
> ii) en ce qui concerne le territoire de la République des Philippines, y compris ses eaux territoriales et ses eaux intérieurs;...»[2]

6. Monsieur le président, chaque Etat est sans doute libre d'assortir sa déclaration d'acceptation de la compétence de la Cour des réserves qu'il souhaite formuler. La Malaisie, qui préfère la voie du compromis à celle de la déclaration unilatérale, n'entend pas donner de leçons à cet égard. Ce serait malvenu. Mais vous me permettrez de trouver singulier que les Philippines ferment avec ostentation la grande porte de l'article 36, paragraphe 2, au contentieux territorial pour tenter ensuite de s'introduire par la fenêtre de l'article 62 dans le prétoire, comme par effraction, et à propos d'un différend territorial qui ne les concerne en rien.

7. En d'autres termes, Monsieur le président, dans cette affaire il n'y a aucun consentement, ni explicite, ni implicite, de l'Indonésie, de la Malaisie ou des Philippines pour saisir la Cour d'un différend territorial les concernant. En particulier, il n'y a aucun consentement des deux Parties à

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[1] *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria). Requête de la Guinée équatoriale à fin d'intervention*, Ordonnance du 21 octobre 1999, par. 15.

[2] Cour internationale de Justice, *Annuaire 1996-1997*, p. 123.

la présente instance à l'intervention de la République des Philippines dans une procédure qui ne la concerne en rien.

8. Quelle conclusion tirer de cet état de choses ? Je n'entrerai pas dans des considérations théoriques sur le «lien juridictionnel». Mais je considère qu'il y a là un signal, un marqueur, qui doit vous inciter à veiller avec une attention particulière à la réunion des conditions que pose l'article 62 pour l'intervention d'un Etat tiers. Et notamment la démonstration de l'existence d'un intérêt d'ordre juridique en cause pour l'Etat requérant.

### L'absence d'intérêt d'ordre juridique en cause pour les Philippines

9. Cet intérêt d'ordre juridique, pour l'Etat en cause, il appartient aux Philippines de l'établir. Cela ressort de votre jurisprudence et notamment de l'arrêt que vous avez rendu, ou qu'a rendu votre Chambre plus exactement, à propos de la requête à fin d'intervention du Nicaragua dans l'affaire du *Différend frontalier (El Salvador/Honduras)*[3].

10. Vous n'imposez pas à ce stade, j'entends bien, de prouver qu'un intérêt d'ordre juridique pour lui en cause doit *nécessairement* être affecté par votre décision. Vous lui demandez d'établir qu'un intérêt d'ordre juridique en cause *peut* être affecté, ce qui est différent. Cet intérêt d'ordre juridique doit être identifié avec précision, puis comparé aux termes de votre mandat, tel que celui-ci résulte du texte de saisine, ici le compromis. Il ne s'agit donc pas d'invoquer un quelconque intérêt juridique général, mais de l'établir en relation avec chacun des «différents points susceptibles d'être tranchés»[4], pour reprendre l'expression de votre Chambre.

11. Le professeur Reisman, on l'a noté tout à l'heure, a été assez discret hier quant aux conditions requises par l'article 62 pour autoriser une intervention, et on le comprend. Il a cependant introduit, avec le talent et l'imagination qu'on lui connaît, un concept nouveau en la matière. Il a inscrit dans l'article 62 de votre Statut une clause subjective — a *subjective standard*[5] — qui rappelle certaines réserves, dites réserves automatiques, naguère incluses dans les déclarations facultatives de juridiction obligatoire. En effet, que dit le professeur Reisman ? Qu'il

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[3] Affaire du *Différend frontalier terrestre, insulaire et maritime(El Salvador/Honduras), requête à fin d'intervention, arrêt, C.I.J. Recueil 1990*, p. 92.

[4] *C.I.J. Recueil 1990*, p. 116, par. 57.

[5] CR 2001/1, p. 27, par. 29.

y a intérêt d'ordre juridique en cause dès lors que l'Etat requérant estime qu'il en est ainsi. C'est au requérant d'apprécier. Les autres Parties et la Cour, quant à elles, se bornent à prendre acte. Tout au plus, concède le professeur Reisman, faut-il que l'intérêt allégué soit bien juridique : «We submit that all the intervening State must demonstrate, at the threshold, is that the interest is one of a legal nature». Je traduis approximativement, «Nous prétendons que la seule obligation pesant sur l'Etat intervenant au seuil de la procédure est d'établir que l'intérêt allégué est bien d'ordre juridique». C'est le service minimum en quelque sorte.

12. Mais, malheureusement pour M. Reisman, l'article 62 ne dit rien de tel. D'abord et au contraire, le texte français du Statut lapidaire, tranche. Alinéa 2 : «La Cour décide.» Surtout, cette conception subjective — et singulièrement laxiste — ne correspond pas au texte de l'article, éclairé par votre jurisprudence. L'article 62 vise un intérêt d'ordre juridique «pour lui en cause», «which may be affected by the decision in the case». C'est justement cette exigence supplémentaire, cette démonstration du lien entre l'intérêt juridique et la cause, que le Gouvernement philippin est incapable d'établir.

13. Le Gouvernement philippin cite comme intérêt d'ordre juridique dans sa requête le sujet suivant :

> «L'intérêt que la République des Philippines porte uniquement et exclusivement sur les traités, les accords et autres éléments de preuve fournis par les Parties et pris en compte par la Cour qui ont une incidence directe ou indirecte sur la question du statut juridique du Bornéo septentrional.»

14. Les Philippines ajoutent :

> «Le Gouvernement de la République des Philippines considère que la question du statut juridique du Bornéo septentrional relève de ses préoccupations légitimes.»

15. La revendication des Philippines sur le Bornéo septentrional est sans fondement, M. l'ambassadeur Kadir vient de vous le démontrer en quelques mots. Il s'agit à notre avis d'une demande de nature politique, non juridique. Très exactement d'une de ces demandes que les rédacteurs du Statut considéraient comme une «intervention politique» en [illegible]920[6] et souhaitaient écarter par la rédaction de l'article 62. Comme le notait en 1920 le comité de juristes chargé de la

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[6] C.P.J.I., *Comité consultatif de juristes, procès-verbaux*, 1920, p. 746.

rédaction de l'avant-projet du Statut : «L'essentiel est de la limiter [l'intervention] aux cas d'intérêt d'ordre juridique, pour exclure l'intervention politique, et d'en faire juge la Cour.»

16. La soi-disant «préoccupation légitime», pour reprendre l'expression du Gouvernement philippin — que nous ne partageons pas, je m'empresse de le préciser — ne constitue en aucune manière un «intérêt d'ordre juridique» pour lui en cause au sens de l'article 62 du Statut.

### Appréciation de l'intérêt d'ordre juridique en cause par référence au compromis du 31 mai 1997

17. L'intérêt d'ordre juridique en cause s'apprécie par référence au compromis dans le cas d'un litige ainsi porté devant votre juridiction. Comme vous l'avez précisé à propos de la requête à fin d'intervention de l'Italie dans l'affaire du *Plateau continental (Libye/Malte)* en 1984 :

> «Dans une affaire soumise par compromis, c'est ce compromis, consacrant le consentement des parties au règlement de leur différend par la Cour, qui indique à celle-ci l'étendue de son action. Etant inscrite au Statut, la possibilité de l'intervention subsiste naturellement dans toutes les instances introduites par un compromis, mais elle ne peut en principe être mise en œuvre que dans le cadre de celui-ci.»[1]

18. Or le compromis passé le 31 mai 1997 entre l'Indonésie et la Malaisie définit l'objet du litige de la manière suivante :

*Article 2*
*Objet du litige*
*(en anglais : «subject of litigation»)*

> «La Cour est priée de déterminer, sur la base des traités, accords et de tout autre élément de preuve produit par les Parties, si la souveraineté sur Pulau Ligitan et Pulau Sipadan appartient à la République d'Indonésie ou à la Malaisie.»

19. Vous l'aurez noté, l'objet du litige est circonscrit avec précision. Il ne s'agit pas de soumettre à la Cour un contentieux territorial aux contours indéterminés, pouvant s'étendre éventuellement à de nouveaux secteurs au gré des parties ... ou des tiers intervenants. En particulier, nous ne vous demandons en aucune manière de vous prononcer sur le statut de Bornéo septentrional, mais sur la souveraineté sur les deux îles de Pulau Ligitan et Pulau Sipadan. Un point, c'est tout !

20. Le Gouvernement des Philippines nous explique, je cite la requête :

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[1] *Plateau continental (Jamahiriya arabe libyenne/Malte) requête à fin d'intervention, arrêt, C.I.J. Recueil 1984*, p. 24, par. 38.

> «Une décision de la Cour ou bien le volet d'une décision de la Cour qui consisterait à prendre en compte certains traités, accords et autres éléments de preuve ayant une incidence sur le statut juridique du Bornéo septentrional mettra inévitablement et sans aucun doute possible en cause la revendication territoriale toujours en suspens de la République des Philippines sur le Bornéo septentrional ainsi que le droit et l'intérêt juridique direct consistant pour les Philippines à régler cette revendication par des moyens pacifiques.»

21. Mais Monsieur le président, la prise en considération par la Cour de certains traités, accords ou autres éléments de preuve ne suffit pas à constituer un intérêt d'ordre juridique en cause, ainsi que l'a précisé la Chambre de la Cour à propos de la requête du Nicaragua dans l'affaire du *Différend (El Salvador/Honduras)* en 1990[8]. Et ceci vaut même si les principes et règles ne sont pas seulement applicables à titre général, mais sont pertinents pour les «éléments particuliers de l'affaire» selon l'expression de la Chambre.

22. L'arrêt rendu par la Chambre de la Cour le 17 septembre 1990 en fait application puisqu'il examine, question par question, s'il existe un intérêt d'ordre juridique en cause, c'est-à-dire susceptible d'être affecté par la décision. Cela ressort clairement du dispositif de l'arrêt. La Chambre, à l'unanimité, dit :

> «que la République du Nicaragua a établi qu'elle a un intérêt d'ordre juridique susceptible d'être affecté par une partie de l'arrêt que la Chambre rendra au fond en l'espèce, à savoir par la décision qu'elle rendra sur le régime juridique des eaux du golfe de Fonseca, mais qu'elle n'a pas établi l'existence d'un tel différend susceptible d'être affecté par toute décision que la Chambre peut être requise de rendre en ce qui concerne la délimitation de ces eaux, par toute décision sur la situation juridique des espaces maritimes extérieurs au golfe ou par toute décision sur la situation juridique des îles du golfe»[9].

23. Or la République des Philippines n'indique pas en quoi la *décision* — je souligne le terme — que la Cour est appelée à prendre au sujet de la souveraineté sur Ligitan et Sipadan peut *affecter* un intérêt d'ordre juridique spécifique. Elle se contente de faire une vague référence aux «traités, accords et autres éléments de preuve» qui pourraient être «pris en compte» par la décision de la Cour. Or l'intérêt d'ordre juridique en cause, je le redis, doit être affecté, le cas échéant, par la *décision* de la Cour et non par la seule *motivation*. L'appréciation que la Cour peut être amenée à formuler sur la portée de tel ou tel instrument juridique, ou les conséquences de tel ou tel fait

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[8] Affaire du *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras), requête à fin d'intervention, arrêt, C.I.J. Recueil 1990*, p. 92.

[9] *Op. cit.*, p. 137, par. 105.

matériel, pour motiver sa décision, cette appréciation n'est pas, en soi, de nature à fonder un intérêt d'ordre juridique en la cause.

24. C'est une autre disposition, l'article 59, qui assure la protection des intérêts juridiques généraux des Etats tiers en précisant l'effet relatif de la décision de la Cour. En affirmant que «la décision de la Cour n'est obligatoire que pour les parties en litige et dans le cas qui a été décidé», l'article 59 assure une protection juridique complète aux Etats tiers, notamment quant à toute appréciation au sujet de traités, d'accords ou d'éléments de preuve avancés par les parties à l'instance.

25. Monsieur le président, Madame, Messieurs de la Cour, la dernière affaire que vous avez dû examiner pour l'application de l'article 62 offre un contraste intéressant avec l'affaire présente. Dans l'affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigéria* et au sujet de la requête à fin d'intervention de la Guinée équatoriale, la réunion des conditions d'intervention prévues par l'article 62 était tellement manifeste que vous n'avez pas jugé nécessaire une procédure orale et que vous avez rendu votre ordonnance du 21 octobre 1999 à l'unanimité. Il est vrai que vous aviez ouvert la possibilité d'une intervention d'Etats tiers par votre arrêt sur les exceptions préliminaires précédent en 1998. Et que les parties à l'instance principale n'avaient pas soulevé d'objection à l'intervention.

26. C'est qu'en l'espèce, l'intérêt d'ordre juridique en la cause était évident. La demande camerounaise empiétait sur les espaces maritimes revendiqués par la Guinée équatoriale. Il y avait — il y a — superposition des prétentions territoriales et donc conflit d'intérêts juridiques. La décision, dans cette affaire, que vous serez amenés à prendre affectera nécessairement, d'une manière ou d'une autre, un intérêt d'ordre juridique de la Guinée équatoriale.

27. Vous avez du reste constaté cet effet nécessaire, inéluctable, de votre décision à venir dans le paragraphe 13 de votre ordonnance :

> «Considérant que, de l'avis de la Cour, la Guinée équatoriale a suffisamment établi qu'elle a un intérêt d'ordre juridique susceptible d'être affecté par un arrêt que la Cour rendrait aux fins de déterminer la frontière maritime entre le Cameroun et le Nigéria.»[10]

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[10] Affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), requête de la Guinée équatoriale à fin d'intervention, ordonnance du 21 octobre 1999*, par. 13.

Le texte anglais d'ailleurs est encore plus net : «it has an interest of a legal nature which could be affected by *any* judgment which the Court might hand down…»

28. Or, dans l'affaire de Pulau Ligitan et Pulau Sipadan, la situation est rigoureusement inverse : *aucun* arrêt que vous pourriez être amenés à rendre ne pourrait affecter *aucun* intérêt d'ordre juridique des Philippines en la cause.

### La question de la souveraineté sur Pulau Ligitan et Pulau Sipadan est sans rapport avec la question du statut du Bornéo septentrional

29. Car, et en tout état de cause — et cette considération me paraît à elle seule suffisante pour écarter toute possibilité d'intervention des Philippines dans la présente affaire — la question de la souveraineté sur Ligitan et sur Sipadan est une question indépendante de celle du statut du Bornéo septentrional. Il ne s'agit pas du même titre territorial dans un cas et dans l'autre. Ce ne sont pas les mêmes instruments juridiques qui sont en cause.

30. Les instruments juridiques avancés et discutés par l'Indonésie et la Malaisie à l'appui de leur revendication sur la souveraineté de deux îles, c'est de notoriété publique et on les retrouve dans les bons ouvrages, sont les instruments suivants :

— la convention du 20 juin 1891 entre la Grande-Bretagne et les Pays-Bas, complétée par les accords de 1915 et de 1928 entre les mêmes parties;

— la convention du 7 novembre 1900 entre l'Espagne et les Etats-Unis;

— l'échange de notes des 3 et 10 juillet 1907 entre les Etats-Unis et la Grande-Bretagne;

— la convention du 2 janvier 1930 entre les Etats-Unis et la Grande-Bretagne.

31. Le Gouvernement des Philippines ne prend pas appui sur ces textes pour fonder sa prétention territoriale sur le Bornéo septentrional. Il discute, quant à lui, de la portée du contrat conclu le 22 janvier 1878 par le sultan de Sulu avec MM. Dent et Von Overbeck, contrat à l'origine de la présence britannique à Sabah. Ce contrat vise le territoire de Sabah, approximativement, y compris les îles, et ceci est précis en revanche, situées à moins de 9 milles des côtes — *together with all the islands which lie within nine miles from the coast.*

32. Or les îles en question se trouvent toutes deux au-delà de cette limite et ne sont donc pas concernées par le contrat du 22 janvier 1878. C'est la raison pour laquelle ni l'Indonésie ni la Malaisie ne se fondent sur ce contrat pour revendiquer la souveraineté sur les deux îles. Les titres

ne sont pas les mêmes pour le Bornéo septentrional et pour les îles se trouvant au-delà des neuf milles. L'origine de propriété n'est pas la même, si je puis utiliser cette analogie de droit privé.

33. Au demeurant, le Gouvernement des Philippines ne cite pas à l'appui de ses prétentions territoriales sur le Bornéo septentrional les textes invoqués par l'Indonésie et la Malaisie dans le litige soumis à la Cour. Dans le petit ouvrage intitulé «*Philippine claim to North Borneo*», publié par le gouvernement à Manille en 1963, ce petit ouvrage nous l'avons déposé à la bibliothèque pour la commodité de la Cour et qui constitue l'exposé le plus complet de cette prétention, 33 annexes sont produites à l'appui du raisonnement de la revendication des Philippines. Vous en trouverez la liste dans votre dossier de plaidoirie. *Aucune* de ces annexes ne vise *aucun* des traités et accords que je viens de mentionner : ni 1891, ni 1900, ni 1907, ni 1930. Le professeur Magallona a sans doute tenté hier, dans sa longue démonstration, d'allonger encore la liste pour les besoins de la cause. Mais l'aveu lui a échappé : «... the Sulu-Overbeck agreement of January 1878 ... is the primal source of the Philippine historic claims». Or, 1878 ne concerne pas nos deux îles.

34. En somme, le statut territorial de Ligitan et de Sipadan ne concerne en rien la République des Philippines. La décision que vous prendrez sur le fond n'affectera les Philippines en rien. L'intérêt d'ordre juridique des Philippines en la présente cause est proprement inexistant.

### Le Gouvernement de la République des Philippines avoue qu'il n'a aucun intérêt pour Pulau Ligitan et Pulau Sipadan

35. Enfin, je constate que le gouvernement des Philippines convient lui-même de cette absence d'intérêt juridique. Il a avoué qu'il n'a pas sa place dans ce prétoire. Ce sont nos amis indonésiens qui le révèlent en annexe à leurs observations, nous n'avons pas eu droit à la même communication du Gouvernement philippin. La lettre du 5 avril 2001 envoyée par l'ambassade des Philippines à Djakarta au département des affaires étrangères de la République d'Indonésie précise en effet, je cite, dans une traduction approximative :

> «Le Gouvernement de la République des Philippines tient à rassurer le Gouvernement de la République d'Indonésie; il n'a aucun intérêt territorial quant aux îles Ligitan et Sipadan» («*it does not have any territorial interest on Sipadan and Ligitan islands*» dans le texte original)».

36. M. Riesman l'a confirmé dans sa plaidoirie[11] d'hier et M. Magallona a longuement analysé les prétentions territoriales de la République des Philippines sur le Bornéo septentrional sans mentionner pour ainsi dire Ligitan et Sipadan. On ne saurait être plus clair. Les Philippines ne sont pas intéressés. De leur propre aveu, ils n'ont aucun intérêt d'ordre juridique en cause dans la présente affaire. Vous écarterez donc *in limine litis* cette demande d'intervention, puisque votre décision ne saurait concerner que la seule question de la souveraineté sur Ligitan et Sipadan et ne saurait affecter que les intérêts juridiques relatifs à ces deux îles. Accepter la demande d'intervention des Philippines serait accepter d'ouvrir le débat judiciaire sur une toute autre question, celle relative à la souveraineté sur le Bornéo septentrional.

37. Comme l'a dit la Cour dans l'affaire *Haya de la Torre*,«déclaration déposée à fins d'intervention ne revêt, en droit, ce caractère que si elle a réellement trait à ce qui est l'objet de l'instance en cours.»[12]

38. Faire droit à la demande de la République des Philippines, ce serait faire perdre à l'intervention au titre de l'article 62 son caractère de procédure incidente pour la transformer en une procédure principale ayant un objet différent, le statut juridique du Bornéo septentrional se substituant à la question de la souveraineté sur les deux îles de Pulau Ligitan et de Pulau Sipadan et opposant des parties différentes, la Malaisie et les Philippines se substituant au différend porté par compromis ici, devant cette Cour, par l'Indonésie et la Malaisie. De cela, sir Elihu vous entretiendra dans quelques instants en évoquant l'objet de l'intervention des Philippines. Ce n'est en rien l'objet de la présente procédure.

39. Monsieur le président, Madame, Messieurs de la Cour, je vous remercie d'avoir bien voulu prêter attention à mes propos. Monsieur le président, je vous prie maintenant de donner la parole à mon collègue, sir Elihu Lauterpacht.

Le PRESIDENT : Je vous remercie M. le professeur et j'appelle maintenant à la barre le professeur sir Elihu Lauterpacht. Sir Elihu you have the floor.

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[11] CR 2001/1, p. 17, par. 2.

[12] *Haya de la Torre, arrêt, C.I.J. Recueil 1951*, p. 77.

Sir Elihu LAUTERPACHT: Mr. President, Members of the Court, once again I have the privilege of addressing my respectful greetings to you. After hearing the comprehensive, encyclopaedic and extended presentation of my friend Prof. Alain Pellet, I am not sure anything that I can say will helpfully add to that. It is rarely that in matters of litigation I can find myself in so much agreement with almost all that he has said. But the Court will understand that Malaysia must present its own view of the situation and so I venture to continue.

1. When my colleagues and I divided up the work of answering the Philippine Application for intervention, I was directed to apply myself to the question of the object of the intervention. If, however, my present contribution were to adhere strictly to this assignment, there would be no need for it. In the interesting arguments addressed to the Court yesterday on behalf of the Philippines, not a word was said about the object of the Application. It was as if the requirement relating thereto did not appear in Article 81 of the Rules. Yet it does so appear — as clear as daylight: the application must specify both the interest of a legal nature that may be affected by the decision in the case *and* it must specify "the precise object of the intervention". Moreover, as this Court has said in its judgment in the Nicaragua Application (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 112, para. 45) the object must be defined in such a way that it "is not so evidently lacking in precision as to justify" its rejection.

2. To some extent the Philippines has attempted in its Application to comply with this second requirement. But, even described in the most glowing terms, this act of seeming compliance was so obscure and incomplete as to raise the gravest doubts as to its sufficiency. In the normal approach to such matters, the Philippines statement would have been clarified and completed in the present hearings. It has not been. So I am obliged to relate my remarks mainly to what the Philippines has said in its written Application.

3. At the outset, it must be recalled that the Philippines has expressly disclaimed any wish to become a party to the dispute between Malaysia and Indonesia regarding sovereignty over the two disputed islands. So the object of its Application is clearly not the obtaining of a decision of the Court binding upon it by virtue of Article 59 of the Statute. So what are we then left with?

4. The Philippines first stated objective is "to preserve and safeguard its historical and legal rights arising from its claim to dominion and sovereignty over the territory of North Borneo, to the extent that they may be affected by a determination by the Court of the question of sovereignty over Pulau Ligitan and Pulau Sipadan".

5. As the Court will immediately see, the central point of this statement is the assertion by the Philippines that it possesses "historical and legal rights". Obviously without such rights there would be nothing for it to "preserve and safeguard", which is stated to be the object of its Application.

6. Malaysia does not accept that the Philippines possesses any "historical and legal rights" of a kind that could be affected by any decision of the Court relating to sovereignty over the disputed islands. This is because the rights asserted do not relate to the islands themselves. As the Court has been told, the Philippines has expressly disclaimed any territorial interest in the islands. But in so far as the Philippines is claiming rights over Sabah more widely, the fact that such an assertion has been made places Malaysia in something of a quandary. Either it counters the assertion or it does not. If Malaysia counters the assertion, it is entering into a substantive dispute with a State with which it has no jurisdictional link and on a subject that is not part of the actual dispute before the Court. Such a discussion is therefore excluded.

7. On the other hand, if Malaysia does not say something in response to the Philippine arguments, the impression may be given that they are both relevant and correct. Such an impression would be quite wrong. The Philippines has no valid claim to Sabah or any part of it.

8. In the circumstances, therefore, Malaysia takes an in-between position, limiting itself to three observations which, by themselves, are quite sufficient to dispose of the Philippines position.

9. Observation No. 1: first, the Philippines totally misunderstands the basis of British and now Malaysian title to North Borneo. That title is today not dependent in any way upon nineteenth century grants or treaties. At no time during the past century, and more than the past century, has North Borneo been in the possession of the Philippines or of the Sultan of Sulu. The Philippines cannot base a claim to an effective modern title on 100 years of absence. This is the same situation as appeared in the recent case of *Qatar* v. *Bahrain*: Qatar could not justify a claim to the Hawar

Islands on the basis of a century of absence. If I may seek to emulate in small part the use of Latin by my learned friend, Professor Reisman, *ex facto jus oritur* —out of the facts rights arise.

10. Moreover, Malaysia's possessory title to North Borneo is confirmed by acceptance by the United Nations that the present title of Malaysia to the area is in full accordance with the will of the people.

11. Observation No. 2: reference may be made to at least six acknowledgments by the Philippines that at the material times North Borneo was British territory. Four of them take the form of acknowledgments in treaties:

(i) On 7 January 1948 Britain and the Philippines concluded an Air Services Agreement containing references to routes to be served by designated airlines of the United Kingdom. Those were "Hong Kong-Manila-British North Borneo-Sarawak-Singapore" and reverse "Singapore-Sarawak-British North Borneo-Manila".

(ii) In an Exchange of Notes between Britain and the Philippines concluded on 20 April 1948 relating to the transfer of the administration of certain islands to the Government of the Philippines, the United Kingdom requested the Government of the Philippines either to contribute to the capital cost of a lighthouse on one of the islands or to allow North Borneo authorities to continue with its maintenance. In its reply, the Philippines stated that it would be agreeable to leasing the site absolutely needed for the lighthouse on Taganak to the State of North Borneo "at a token rental for as long a period as North Borneo needs and desires to use the lighthouse". True, the Philippines did not use the expression "British North Borneo" but it did not demur to the representation of the State of North Borneo by Britain.

(iii) In a later Air Services Agreement between Britain and the Philippines of 31 January 1955 we again find a reference to "British Borneo Territories".

(iv) On 29 April 1955, Britain and the Philippines concluded a labour agreement to facilitate the recruitment of workers in the Philippines to be employed in North Borneo. The Government of the United Kingdom was therein described as acting on behalf of the Government of Borneo. This kind of treaty acknowledgment of Britain's rule in North Borneo cannot be disregarded.

Additionally, there are at least two instances of recognition in the internal legal system of the Philippines.

(i) The first relates to the text of the Philippine Constitution that was ratified in March 1947 by a plebiscite. Section 1 of the Constitution, which defined the territory of the Philippines, referred to, amongst other things, "the treaty concluded between the United States and Great Britain on 2 January 1930". This Treaty referred to "the State of North Borneo which is under British Protection". The fact that the reference does not appear in a later Philippine Constitution, adopted a quarter of a century later, cannot change the effect of the original acknowledgment.

(ii) The second recognition is manifested in the Philippines legislation enacted in 1961 by which it defined the baselines of the Philippines territorial sea. This made no mention of any Philippines claim to North Borneo. Indeed, it even referred to the delineation made under the Anglo-United States Treaty of 1930 which, as has already been mentioned, referred to British North Borneo. The addition, in 1968, of a reservation by the Philippines Congress cannot eliminate the effect of the original legislation as evidence of the Philippines conduct consistent with its belief at that time that its territory did not include North Borneo.

12. Observation No. 3: to these instances of Philippine recognition of British title one may add, thirdly, mention of two occasions when the Philippines has remained silent in circumstances where it should have protested, had it wished to oppose British title to the area.

(i) When the United Kingdom annexed North Borneo on 15 July 1946 by means of the North Borneo Cession Order, the Philippines took no action. As Professor Magallano stated yesterday, in 1947, ex-Governor Harrison, the then adviser to the Philippines President, wrote to the Philippines Secretary for Foreign Affairs stating that that measure by the British Government was "an act of political aggression" — and these were the words used by Governor Harrison — "which should be promptly repudiated by the Government of the Philippines". Professor Magallano said that the Philippines Government had repudiated the British act. But no reference is made to any such repudiation in the sources that I have seen, and no doubt Professor Magallona will be able to provide appropriate details on Thursday.

(ii) The Philippines failed to enter any reservation until 1962 — that is, 17 years after the establishment of the United Nations — in respect of the filing by Britain with the United Nations of information on North Borneo as a non-self-governing British territory under Article 73 *(e)* of the United Nations Charter.

13. Mr. President, I have said enough about the substance of the Philippines claim to Sabah. My purpose has been to demonstrate that the Philippines assertion that it has historical and legal rights to the territory of Borneo which it wishes "to preserve and safeguard" is a fiction which is quite unsustainable. It must, therefore, be regarded as a claim evidently lacking in precision. The pursuit of so manifestly defective a claim is not a proper object for an intervention application.

14. In the light of what I've just said, it is unnecessary for me to spend any time on the second stated object of the Philippines Application, which was "to inform the Court of the nature and extent of the historical and legal right of the Philippines which may be affected by the Court's decision". As a statement of object it founders on the same ground as the first stated object: it assumes the existence of legal rights of the Philippines which may be affected by the Court's decision. But for the reasons I have already given the assertion of such rights is manifestly unsustainable. The giving of information to the Court about unsustainable rights is not a proper object for intervention.

15. However, in connection with both the first and second stated objects of the Philippines Application, there is one point of great importance that requires clarification. It is that during the period since the establishment of the Philippines as an independent State in 1946, the Philippines has had ample opportunity, if it had wished to take it, to bring its claim to North Borneo before this Court. Both Prof. Reisman and Prof. Magallona yesterday referred to Philippines diplomatic initiatives seeking agreement to bring this matter to the Court. And they did so in words that suggested that in some way Britain was at fault for having deprived the Philippines of an opportunity of securing a judicial settlement of the matter. But in truth, the position is quite otherwise. The Philippine claim has not been brought before this Court because the Philippines have chosen not to bring it here.

16. Mr. President and Members of the Court, permit me to offer you the following chronology reflected in the relevant declarations under the Optional Clause that I hold in my hand, and these have all been extracted from the *Yearbook* of the Court. First, on 28 February 1940 the United Kingdom filed a declaration under the Optional Clause accepting the compulsory jurisdiction of the Permanent Court. Nothing in this declaration would have excluded the jurisdiction of this Court in a territorial dispute of the kind that the Philippines assert exists in relation to North Borneo. But before 1946, of course, the Philippines was not an independent State and could not have commenced proceedings. Moreover, the work of the Permanent Court was suspended during the Second World War. But the British Declaration of 1940 remained effective for 15 years until it was replaced by a new Declaration in 1955, on 2 June.

17. Second, in the meantime, on 14 July 1946 the Philippines had become independent, had become a Member of the United Nations and, thereby, a party to the Statute of this Court. If it had wished, it could have filed its own declaration under the Optional Clause in such a way as to enable it to start proceedings against the United Kingdom in respect of North Borneo. And may I just say that at that time the United Kingdom Declaration contained no reservation, such as the one which first appeared in 1957, excluding cases brought by States which had themselves accepted the Optional Clause only for the purpose of the dispute or less than 12 months before starting proceedings.

18. Three, next pertinent date is 21 March 1947 when the Philippines filed its own Optional Clause declaration without any reservations. From that moment onwards the Philippines could have taken advantage of the United Kingdom Declaration to invoke the compulsory jurisdiction of the Court in relation to North Borneo, and without any complications. But the Philippines took no such initiative.

19. Four, then on 2 June 1955, the United Kingdom replaced the 1940 Declaration with one which, in respect of territorial disputes, was as unlimited as the previous one. The window of totally unrestricted opportunity was thus to remain completely open for a further two years, making ten in all so far. On 18 April 1957, it was slightly closed. The United Kingdom replaced its 1955 Declaration with one excluding disputes relating to any question which in the opinion of the United Kingdom Government affects the national security of the United Kingdom or of any of its

dependent territories. Therefore, if the Philippines had started proceedings, it might have been possible for the United Kingdom to have invoked this reservation. Whether it would have done so cannot now be determined. The United Kingdom might have taken the view that use of the reservation would not have been appropriate in the circumstances. Or the Philippines might have argued that the reservation, being an "automatic" one, could not be validly invoked. The fact remains that the Philippines could have started proceedings; it did not do so.

20. Five, on 26 November 1958 the United Kingdom replaced the 1957 Declaration by one containing a significant amendment to the automatic reservation of 1957, though retaining it in respect of events occurring before the date of the new declaration, i.e., 26 November 1958. But it would seem that if the Philippines had related their claim to events occurring after that date, namely, the continuing allegedly unlawful retention of North Borneo by the United Kingdom, the reservation would not have been operative.

21. Six, on 16 September 1963, Malaysia, including North Borneo, under the name of Sabah, became independent. So, for the continuing state of affairs after that date the United Kingdom could not have been made responsible. But that would not have prevented the Philippines from initiating proceedings against the United Kingdom, in respect of its control of North Borneo before Malaysian independence.

22. Seven, on 27 November 1963 the United Kingdom replaced the 1958 Declaration, removing the residue of the automatic reservation that had been retained in the 1958 Declaration. The 1963 Declaration was in its turn replaced on 1 January 1969 by one which did not limit in any material respect Britain's existing exposure to proceedings by the Philippines.

23. And that brings us to the final relevant item in this chronology: number eight. On 18 January 1972 the Philippines itself firmly closed the door that had been open to it since 1947 by filing a new declaration, replacing its 1947 Declaration, which excluded any dispute "arising out of or concerning jurisdiction or rights claimed or exercised by the Philippines in respect of the territory of the Republic of the Philippines". Obviously this reservation could be reciprocally invoked by any State against which the Philippines might start proceedings relating to the respondent State's territory.

24. What then is the significance of this chronology? It shows, principally, that from the moment at which it became independent in July 1946 until January 1972 the Philippines could unilaterally have brought proceedings against the United Kingdom in respect of the Philippines claim to North Borneo — a period of over a quarter of a century. Until 1963 those proceedings could have challenged British retention of North Borneo. After 1963 they could have challenged the legal consequences of Britain's earlier retention of North Borneo. Such proceedings would not have required the agreement of the United Kingdom; but they were never brought. Yesterday, Prof. Magallona mentioned — and I quote his words — "the rare demonstration of unanimity" of the Philippines Congress in 1962 when it adopted a resolution urging the President to take the necessary steps for the recovery of certain portions of the island of Borneo. This resolution, said Prof. Magallona, was the result of years of study and deliberation and reiterated a similar consensus expressed by the Philippine Congress in 1950. Why then was this strong view of the Philippines not reflected in the litigation that was open to it?

25. The second point of significance is the following: the possibility of Philippines-initiated process against the United Kingdom, properly framed and pursuing directly the Philippines claim, demonstrates the essentially vexatious character of the present Application. The Philippines has been unwilling to face up to the implications of proper litigation proceedings leading to a judgment by which as a party it would be bound. Instead, the Philippines has chosen this indirect way of making what can, in effect, be no more than a political gesture. It has tried to justify the imprecision of the statement of its objects by complaining that it could not be more exact because it had been denied access to the pleadings and, therefore, could not really know what is in issue in this case. It suggests that this denial of access is unique and unprecedented. It is not. Prof. Pellet has already indicated the other cases in which recourse to the pleadings was similarly denied to third parties.

26. If I may be permitted a word of personal recollection, I can remember standing on this very spot before this august Court just over 20 years ago, on 19 March 1981, presenting argument on behalf of Malta in its Application to intervene in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (*I.C.J. Reports 1981*, p. 3). In that case, as in this, Malta had

been denied access to the pleadings. Nonetheless, Malta set out in detail the nature of its claim. Perhaps it set it out in too much detail. Does one detect a note of weariness in the Court's description of my humble efforts? I quote from the Judgment:

> "These specific elements [there were five of them] on which Malta bases its request were further particularized at the hearing, when its Counsel spelt them out for the Court, point by point. Coast by coast, bay by bay, island by island, sea area by sea area, Counsel for Malta indicated local and regional factors which it claimed as having possible relevance in determining the continental shelf boundaries of the States concerned." (*I.C.J. Reports 1981*, pp. 17-18.)

And there was more after that. But what matters is not what the details were, only that they were detailed. Malta in effect spelt out its continental shelf claim. The Court was fully informed. When its Application was rejected, Malta was able to feel that its views on the substance of the matter were known to the Court.

27. The Philippines has chosen not to spell out its case in comparable detail. As one reads the interesting argument of Prof. Magallona yesterday, one may observe that as a statement of the Philippine case, with one exception, it covers nothing after 1900 — the exception being the North Borneo Cession Order of 1946. Yet, by reference to published sources and even without access to the pleadings, the Philippines could readily have ascertained for itself some of the fundamental elements in the dispute between Malaysia and Indonesia; and it could more specifically have related its concerns to those issues. It has not done so. It has not attempted to grapple with the significance of actual British and later Malaysian possession and administration of the territory for a century and a quarter.

28. But that does not entitle the Philippines to be given a second chance by being allowed now to intervene further in this case. A failure specifically to define the object of the Application cannot be converted into a statement of an object. The Philippines has not met the requirements that the Court has laid down for a successful application.

29. All of which brings me finally and briefly to the third stated object of the Philippines Application — as they put it, to appreciate more fully the indispensable role of the Court in comprehensive conflict prevention and *not merely*, I emphasize, *not merely*, for the resolution of legal disputes.

30. My first observation takes the form of a question: What as a matter of literal interpretation does it mean when the object is stated as being "to appreciate more fully the indispensable role of the Court" and so on. How can an "object" appreciate the role of the Court? Or do the words refer to the appreciation by the parties? Or perhaps to appreciation by the Court of its own role? Whatever the meaning may be, its obscurity invalidates it as a statement of an acceptable object.

31. But there is a second, and perhaps more important, observation to be made. The Philippines statement of the "object" appears to introduce into the case an inadmissible element. The statement distinguishes between (1) resolution of legal disputes and (2) comprehensive conflict prevention. Evidently these two elements are presented as being different from one another. Since the reference to the resolution of legal disputes exhausts the possible role of the law in the matter, the reference to "comprehensive dispute prevention" appears intended to import into the situation some non-legal basis of settlement. Manifestly this is outside the competence of the Court. The Court is limited by the words of Article 38, paragraph 1, of its Statute to deciding disputes in accordance with international law, that is, unless there is an agreed submission to the Court for a decision *ex aequo et bono*.

32. So there is really nothing left to the statement of the third object. If it is a plea to the Court to introduce policy considerations favouring intervention where the law does not, then it is worth recalling one sentence in the Court's Judgment on Malta's Application to intervene in the *Tunisia/Libya* case:

> "The Court, ... emphasizes that it does not consider paragraph 2 [that is paragraph 2 of Article 62, which says: 'It shall be for the Court to decide upon this request.'] to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy." (*I.C.J. Reports 1981*, p. 12, para. 17.)

33. And so, Mr. President and Members of the Court, I approach the end of my submissions. Their essentials are very simple. In so far as the Philippines are suggesting that their object is to safeguard some legal right, then I submit that that alleged right is so manifestly unsustainable that it cannot form, as Philippines claim that it does, an essential ingredient of the object of the intervention Application. In so far as the Philippines are claiming that the object of their Application is to secure a judicial consideration of some aspect of its legal position, I point to the

fact that the Philippines has had ample opportunity in the past to turn to this Court. The only interpretation that can be put on its inaction is that it has deliberately chosen to remain inactive. Now is not the time and the present case is not the place for the Philippines to change their position. In the submission of Malaysia, the Court should dismiss the Application in its entirety. Thank you, Mr. President and Members of the Court, especially for your patience in allowing me to run until the very last moment.

The PRESIDENT: Thank you very much, Sir Elihu. C'est par cet exposé que se termine la première plaidoirie de la Malaisie. C'est également par cet exposé que prend fin l'audience de ce jour. Je tiens à remercier chacune des Parties ainsi que le Gouvernement des Philippines pour la qualité des exposés qui nous ont été présentés comme pour la retenue dont elles ont fait preuve dans l'utilisation du temps qui leur avait été alloué. La Cour se réunira à nouveau à partir du 28 juin pour le second tour de plaidoiries. La République des Philippines disposera à cet effet d'une séance d'une heure et demie qui s'ouvrira le jeudi 28 juin à 10 heures. Les deux Parties disposeront pour leur part le vendredi 29 juin au matin d'un temps de parole d'une durée totale également d'une heure et demie. Je vous remercie. La séance est levée.

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*La séance est levée à 13 heures.*

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**CR 2001/3**

**International Court**
**of Justice**

**THE HAGUE**

**Cour internationale**
**de Justice**

**LA HAYE**

## YEAR 2001

***Public sitting***

***held on Thursday 28 June 2001, at 10 a.m., at the Peace Palace,***

***President Guillaume presiding***

***in the case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan***
***(Indonesia/Malaysia)***

***Application for permission to intervene filed by the Republic of the Philippines***

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## VERBATIM RECORD

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## ANNÉE 2001

***Audience publique***

***tenue le jeudi 28 juin 2001, à 10 heures, au Palais de la Paix,***

***sous la présidence de M. Guillaume, président***

***en l'affaire relative à la Souveraineté sur Pulau Ligitan et Pulau Sipadan***
***(Indonésie/Malaisie)***

***Requête à fin d'intervention déposée par la République des Philippines***

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## COMPTE RENDU

| | | |
|---|---|---|
| ***Present:*** | **President** | **Guillaume** |
| | **Vice-President** | **Shi** |
| | **Judges** | **Oda** |
| | | **Bedjaoui** |
| | | **Ranjeva** |
| | | **Fleischhauer** |
| | | **Koroma** |
| | | **Vereshchetin** |
| | | **Higgins** |
| | | **Parra-Aranguren** |
| | | **Kooijmans** |
| | | **Rezek** |
| | | **Al-Khasawneh** |
| | | **Buergenthal** |
| | ***Judge ad hoc*** | **Weeramantry** |
| | | **Franck** |
| | **Registrar** | **Couvreur** |

***The Government of the Republic of the Philippines is represented by:***

**H. E. Mr. Eloy R. Bello III, Ambassador of the Republic of the Philippines to the Kingdom of the Netherlands,**

*as Agent;*

**Mr. Merlin M. Magallona, Under-Secretary of Foreign Affairs, Government of the Republic of the Philippines,**

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LE PRESIDENT : Veuillez vous asseoir. La séance est ouverte. Nous sommes réunis aujourd'hui pour entendre le deuxième tour de plaidoiries de la République des Philippines et je donne immédiatement la parole au professeur Michael Reisman. *Professor Reisman, you have the floor.*

**Mr. REISMAN:**

1. Mr. President, Members of the Court, Professor Magallona and I appreciate the opportunity to respond to learned counsel for Indonesia and Malaysia and to correct certain misunderstandings or distortions of our position and differences with respect to the law. Let me begin by stating a fundamental difference. The Court will recall that we emphasized the dual function of Article 62: for the State which considers that it has an interest that may be affected by a decision in a case between two other States and, equally, if not more important, as a mode by which the Court can inform itself of possible consequences of a decision for a third State that the immediate parties will not bring to its attention. Article 62 is as vital to the Court in its application of justice as it is to the third State in its pursuit of justice.

2. The Philippines believes that in this case, one or both of the Parties may rely on treaties and agreements and press interpretations of these instruments that could affect its interest of a legal nature, specifically its long-standing claim to territories in North Borneo. It is that concern and not a claim to the islands in dispute that has stimulated the request for the pleadings and documents and the opportunity to submit written and oral observations. After Tuesday, it is plain that, in spite of the fact that the Philippines does not challenge the claim of either Party, both are utterly disdainful of the Philippine interest, such that without its intervention, its interest and view will simply not be before the Court. The Parties to this case oppose intervention for different reasons: Indonesia acknowledges that there is a "long-standing claim" to territory in North Borneo, on which it takes no position but it objects to intervention on the ground of timeliness. Malaysia simply denies that there is an interest or that the Philippines has failed to demonstrate such an interest. The presentations by Malaysia and Indonesia on Tuesday do demonstrate one common ground: the last thing that both States wish is for the Court to be informed of the Philippine interest and the way it might be affected. We believe that we have now fully complied with the requirements of

Article 62 and Rule 81 and should be permitted to intervene, for without allowing intervention, the Court will not be fully informed of effects that may flow from its decision which could prejudice Philippine interests of a legal nature.

### The preliminary character of the Article 62 procedure

3. As we understand the procedure contemplated by Article 62, it is not an intervention in its own right, but a preliminary determination by the Court as to whether a party should be permitted to intervene. If this preliminary procedure yields an affirmative decision by the Court, then the intervener receives copies of the pleadings and documents and is entitled to submit a written statement to which the parties may respond in writing and to submit observations in the oral proceedings, but *only* "with respect to the subject-matter of the intervention". Under Article 62, the Court does not decide on the interest and how it may be affected by the decision, but only whether the applicant for intervention has shown that it has an interest of a legal nature and that it *may* be affected by a decision of the Court. We do not suggest, for a moment, as Professor Pellet intimates and Professor Cot said, that the Court does not make this decision. But we do say that in the absence of a jurisdiction *ratione materiae* and *ratione personae*, the Court perforce gives great weight to the subjective assessment of the requesting State in deciding whether to allow intervention. Thereupon, and only thereupon, the intervener, now supplied with pleadings and documents, participates in the very limited way prescribed in Rule 85. It is the Court that then decides how, if at all, to deal with the intervener's interest of a legal nature in its own judgment. Professor Magallona and I had the feeling on Tuesday that our learned friends assumed and acted as if we had received the pleadings and documents and were already arguing about them and were obliged to make the case which we would — and could only — make in the merits phase when we are permitted to take the carefully circumscribed role of the intervener. But, of course, we have not received the documents and do not know their contents. As petitioners for the right to intervene, that is one of the things we are asking for.

### The interest of a legal nature

4. In the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene*, the Chamber said:

> "[I]t is clear, first, that it is for a State seeking to intervene to demonstrate convincingly what it asserts, and thus to bear the burden of proof; and, second, that it has only to show that its interest 'may' be affected, not that it will or must be affected." (*Judgment, I.C.J. Reports 1990*, p. 117, para. 61.)

We believe that we have demonstrated to a level required by Article 62 our interest of a legal nature. *First*, there is a dispute. Indonesia acknowledged it on Tuesday, characterized it as a long-standing dispute. Professor Pellet called it "an ancient and recurring dispute". Malaysia, long involved in the dispute, its Agent even announcing in open court that its own position was non-negotiable, insisted — in defiance of logic — that there was no dispute, and, in any case, that the Philippines had no legal rights in the matter. This, in itself, seems dramatic evidence of a dispute but, more to the point, all three Parties have issued joint declarations confirming the dispute. *Second*, the dispute is not a recent, frivolous invention designed to complicate this case, but is long-standing and based upon very serious legal and factual arguments. *Third*, the Parties to the case have acknowledged the Philippines claim and in a solemn international declaration confirmed the common position that it should be resolved in accordance with international law. This declaration constituted an important internationalization of the dispute, from which flow procedural implications that are not irrelevant to a request under Article 62. *Fourth*, we have shown that certain of the treaties, upon which we believe — with even more confidence after hearing the arguments on Tuesday — that the Parties are relying upon, are critical to the rights which we claim in certain territory in North Borneo. The fact that counsel for Indonesia states that some of these treaties are being relied upon and counsel for Malaysia states that they are not, gives us even greater cause for disquiet. *Fifth*, we have shown that interpretations which the Court may be invited to adopt to support the claim of one of the Parties could affect the interests of the Philippines. In sum, we submit that we have shown, as required by Article 62, that we have an interest of a legal nature.

5. Professor Cot says that the interest we have described is "political" and has no legal basis. His authority for this conclusion is the statement to that effect made immediately prior to his appearance by the Malaysian Agent. Professor Pellet contends that the Philippine interest does not amount to an interest in the sense in which the term is used in Article 62 of the Statute. We agree entirely with the jurisprudence of the Court in *Tunisia/Libya* and *Nicaragua* that a concern about rules and general principles of law does not constitute sufficient interest under Article 62. The

issue here, however, is not general principles of law, but specific treaties about territory which have an effect on us. None of those other cases deals with a situation in which an interpretation of a territorial treaty upon which one of the parties is relying will affect — and possibly profoundly — the interest of a third State and with respect to which the third State wishes to inform the Court of the risk. We do not agree with Professor Cot's statement that the *Nicaragua* Judgment speaks to this particular issue at all.

### Is the interest affected?

6. Could our legal interest be affected by the decision in this case? The standard which Article 62 applies is conditional. The applicant for permission to intervene need only show that a decision *may* affect its interest. In a maritime boundary dispute, a third State can point to a chart to show the vector of a provisional equidistant line. In this case, things are more complicated. We asked for the documents but were denied, so we must be speculative. Professor Pellet is quite right that Malta, too, was denied the documents before it sought to intervene, but that was a maritime case and charts and minimum familiarity with "equitable principles" was enough to give them a sense that they believed their interests were threatened. That is not our situation. The Parties who denied us the documents insist that there is no relation between their case and our interest. If that is so, why were they, having solemnly declared that there was a dispute, still so loath to allow a neighbouring State to see the documents to assuage its real concerns? This was not, as Professor Pellet suggests, an exercise of curiosity or an "academic" mission. An intervention under Article 62 is too serious an endeavour — not to speak of being too expensive politically — to be undertaken for idle curiosity.

7. What burden with respect to specificity must we discharge in the specific circumstances of this case? Here, Mr. President, Members of the Court, I must return for a moment to the rejection of our request for documents under Rule 53. We are not, incidentally, engaged in an appeal from that decision, as Mr. Bundy contended, but, given the nature of this case, there are certain procedural and substantive consequences that inevitably flow from the denial of the pleadings and documents. This is not, as I said, a case in which the third State need only look at a public chart. We need information and if we have been denied access to the pleadings and submissions, it is a

caricature of law for the States that denied the access to tell us to "guess" what is in the documents and then to fault us for not being precise. In the circumstances of this case, the "may" in Article 62's "may be affected" has to be more elastic.

8. In fact, the presentations of Indonesia and Malaysia on Tuesday only confirmed our suspicions that the Philippines interest may indeed be affected. In paragraph 31 of his pleading, Professor Cot cited four treaties and agreements relied upon or challenged by one or both of the Parties to prove their title to the contested islands, and he conceded, in paragraph 32, that the Philippines "does not cite any of these texts to advance its territorial claim on North Borneo". The Court will recall that Professor Magallona on Monday dealt with three of those four treaties. Professor Cot proceeds to argue, in paragraph 33, that neither Indonesia nor Malaysia has founded its territorial claim on the grant of the Sultan of Sulu of 1878. But Mr. Bundy's tracking of the chain of succession at page 8 of his pleading tells a different story. The statements made by Indonesia and Malaysia on Tuesday provide evidence that the Court will be presented with many of the treaties and agreements upon which the Philippines claim is based and will be pressed to adopt interpretations that will certainly affect the Philippine interest.

9. Professors Cot and Pellet, in different ways, assert that the interest of a legal nature of the State requesting permission to intervene must be related to the dispute between the parties to the case and that it is the parties' submission that determines the permissible scope of the third State's interest. Because the Philippines disavows an interest in the outcome of the dispute over the islands, they conclude that the Philippine interest does not relate to the case at bar and, hence, fails the test of Article 62. For authority, they cite the 1984 Maltese request, and the 1990 Nicaraguan intervention. Those Judgments support us. The lawful purpose of an intervention under Article 62 is, indeed, not to graft a new case onto the one before the Court, rather, as the Chamber said in 1990, "[i]ntervention under Article 62 of the Statute is for the purpose of protecting a State's 'interest of a legal nature' *that might be affected* by a decision in an existing case already established between other States . . ." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 133, para. 97; emphasis added).

10. We find nothing in the precedents about the permissible scope of an intervention being determined by the language of the submission, but rather by the possible consequence of the Court's decision. The test is not *connective*, but *consequential*; not whether there is a "connection" to the submission — whatever that means — but whether the decision of the Court could affect the interest of a legal nature of a third State. Malaysia insists that, while its argument for the islands may rely on some treaties which the Philippines might rely upon, its arguments have no connection with the Philippine claim to North Borneo. But if its theory of the case imports a chain of title that is inconsistent with the claim of title upon which the Philippines bases its claim to territories in North Borneo, that interpretation will affect interests of a legal nature. If the Court is later seised of the Philippine claim to North Borneo — as proposed on many occasions by the Philippines — how will the Court deal with the Philippine claim if it has already decided it — in the absence of the Philippines?

11. Professor Cot seems to acknowledge that the test is consequentiality when he states at paragraph 24 that "the interest of a legal nature . . . must be affected by the decision of the Court and not just by the reasoning". I do not wish to go into an enquiry of the extent to which the reasoning of a judgment is part of its *res judicata*, a venerable problem in this Court which Judge Anzilotti originally took up in its predecessor. Suffice it to say that the Court's reasoning is the very stuff of international law. Treaties about territorial title and their interpretations "necessarily imping[e] upon third States", as the *Eritrea/Yemen* Tribunal said.

12. We submit that, on the basis of that part of the record to which we have been allowed access, the probability of consequences for the interests of the Philippines meets the "may" requirements of Article 62 and justifies Philippine intervention.

### What is the quantum required?

13. Rule 81 (2) *(b)* requires the application to intervene to state "the precise object of the intervention". Given the handicap that we laboured under in the unique circumstances of this case, in contrast to, let's say, a maritime delimitation case, and having been denied the documents, the Philippine Application stated, in sections *(a)* and *(b)* of its objects:

> "*(a)* First, to preserve and safeguard the historical and legal rights of the Government of the Republic of the Philippines arising from its claim to dominion and

> sovereignty over the territory of North Borneo, to the extent that these rights are affected, or may be affected, by a determination of the Court of the question of sovereignty over Pulau Ligitan and Pulau Sipadan.
>
> *(b)* Second, to intervene in the proceedings in order to inform the Honourable Court of the nature and extent of the historical and legal rights of the Republic of the Philippines which may be affected by the Court's decision."

Some six weeks ago, Indonesia and Malaysia filed their observations on our Application, which supplied us with a little more information. Thanks to that addition, Professor Magallona on Monday was able to explain in further detail our concerns and objectives. We thank Professor Pellet (at page 4) for acknowledging that our objective of intervening to *inform* the Court is, as the Chamber said in the Nicaragua intervention, a legitimate object under Article 62. Indeed, the full Court in its Order of 1999, allowed Equatorial Guinea to intervene "to state its views as to how the maritime boundary claims of Cameroon or Nigeria may or may not affect the legal rights and interests of Equatorial Guinea". In the case concerning *Land, Island and Maritime Frontier Dispute* the Chamber said: "It is for the State seeking to intervene to identify the interest of a legal nature which it considers may be affected by the decision in the case, and to show in what way that interest may be affected . . ." And the Court acknowledged the idiosyncratic character of each case: "What needs to be shown by a State seeking permission to intervene can only be judged *in concreto and in relation to all the circumstances of a particular case.*"

14. We submit that the Application, supplemented by Professor Magallona's scholarly review of the historical claim, amply demonstrates the object of the intervention for the purpose of a decision under Article 62.

15. Now Sir Eli says that that is still not enough and, on Tuesday, he recounted the numbing detail with which, 20 years ago, *he* presented to the Court the objects of Malta's Application to intervene. Considering that Malta's Application was then denied, Sir Eli's model does not seem like one to emulate, though we can certainly understand why he would urge it on us. We submit that the objects *(a)* and *(b)* in the Application make clear the objectives of the Philippines in applying to the Court for permission to intervene under Article 62, are consistent with the Court's jurisprudence; and amply fulfil the requirements of the Statute.

### Timeliness

16. Mr. President, Members of the Court, I turn briefly to the issue of timeliness raised by Mr. Bundy. In appraising the general issue of timeliness, it is important to relate the Application to intervene to the prior request for access to the submissions, the written submissions, under Article 53. As I mentioned on Monday, the present Application might well have been obviated, had access not been opposed.

17. The Philippines could not have been more timely under Rule 53 or Article 62. Other than in the obvious case of a maritime boundary, the logical sequence for a State considering that an interest may be implicated in a case between two other States is to request the documents in the case under Article 53 of the Rules. When would Indonesia expect the request under Article 53 to come? Before the Parties had made their written submissions? That would be absurd, there would be nothing to request. The proper time is when the bulk of the written submissions have been made. And this is precisely when the Philippines requested — and requested a second time — copies of the pleadings under Article 53.

18. In the nature of the case, the Philippines could hardly have requested permission to intervene under Article 62 before it tried to secure the documents. And it was only when it became apparent that the request for the documents was not going to be granted, that the Philippines requested permission to intervene. So the fact is that not only is the Philippines within all the time-limits, it could not, as a logical and practical matter, have submitted its request any sooner.

19. So we submit that under the prudential calculus of timeliness, the equation is positive in favour of the Philippines. We do not agree that our intervention — if approved by the Court — will impose any procedural hardships on the Parties or the Court. As we have said, we are not requesting a restructuring of the case or the Bench or the scope of the submission and will accept whatever timetable the Court may wish to prescribe.

20. Mr. President, Members of the Court, on Monday, I submitted to you that this is a case of first impression for three, interrelated reasons: the character of the interest, the character of the case in which it may be engaged and the denial of pleadings and documents. I suggested that Article 62 is as important for the Court as it is for the would-be intervener and that, in the instant case, it is even more important for the Court, given the nature of the case, and the handicaps under

which the Philippines labours. We submit that the Philippines has fulfilled the requirements of Article 62 and that it should be permitted to intervene.

21. Mr. President, Members of the Court, we appreciate that from the standpoint of the parties to the litigation and, to an extent, from the standpoint of the Court, an application to intervene under Article 62 is always awkward and likely to be greeted with less than enthusiasm. The intervener is seen as an intruder, an interloper, an uninvited guest, an ill-mannered "party-crasher", a troublemaker. In this sense, intervention is never "timely". The paradigm of the Statute is binary, bilateral: a dispute between two parties and, even if there are more than two, then only two groups of interests. But the drafters of the Statute appreciated that that paradigm is not always true to reality. Even a bilateral dispute may involve the interests of third parties, in the sense that some possible decisions of the Court could affect those interests. When those interests are of a legal nature, the drafters of the Statute decided, in their wisdom, that it is better that the Court, as the principal judicial institution of the world, be informed than remain ignorant of and oblivious to those interests.

22. As we read the recent jurisprudence of the Court, there is a new appreciation of the utility of Article 62 and an acceptance, in a world of interdependence, more and more of whose disputes are appearing in the docket, that intervention is the other side of interdependence. It reflects a fact of life and has a place — a normal place — in the procedure of the Court, both to protect the interests of a legal nature of the third State and to protect the judicial function.

23. Mr. President, Members of the Court, thank you for your attention. Mr. President, I now ask you to call upon Professor Magallona.

Le PRESIDENT : Je vous remercie, professeur Reisman. I will now give the floor to Professor Merlin Magallona.

Mr. MAGALLONA: Mr. President, Members of the Court:

1. During the oral presentations by Indonesia and Malaysia last Tuesday 26 June 2001, several points were raised on the matter of the definition of the Philippines "interest of a legal nature which may be affected by the decision of the case". As we have endeavoured to explain in the course of our initial arguments, the Philippines "interest of a legal nature" is founded on the

interpretation, application and appreciation by this Court of specific treaties, agreements and other documents adduced by Indonesia and Malaysia which could affect the Philippines outstanding territorial claim to certain territories in North Borneo. It should be beyond argument now that there is a serious and long-standing dispute about these interpretations and their consequences.

### Reply to Indonesia

2. The Agent of Indonesia has stated that his Government does not wish to express any views at this time on the merits of the Philippines historic claim to North Borneo[1]. Counsel Pellet has further stated that Indonesia does not wish to comment on what he calls the "long-standing dispute between the Philippines and Malaysia"[2]. My Government respects these views taken by Indonesia. As we said last Monday, it is not, and it was never, the intention of the Philippines to ventilate the merits of its claim in these proceedings, nor to seek an endorsement of its substantive views regarding this claim on the part of any government or party. May I stress, though, that Indonesia by its statements has expressly acknowledged that there is a historic claim that has been asserted, and that there is, in its own words, a "long-standing and recurrent dispute between Indonesia and Malaysia" occasioned by this claim. These statements are a reiteration of the judicious stand taken by Indonesia as reflected in the Manila Accord of 1963, to which I have already referred in my presentation last Monday.

3. And yet, while Indonesia attempts to project an attitude of disinterestedness on the merits of the Philippine claim to North Borneo, Indonesia has invoked these same merits of the Philippine claim in its case against Malaysia. In the discussion on the "Implications of the Application for the Merits of the Dispute between Indonesia and Malaysia", counsel Bundy[3] says that Malaysia's claim to the islands of Sipadan and Ligitan has been undermined by the substantive merits of the Philippine claim to North Borneo. Thus, Indonesia recognizes the positive merits of the Philippine claim to North Borneo that "flow from the Philippines Application and Malaysia's reaction to it *which have a fundamental bearing on the issue of sovereignty over the islands of Ligitan and Sipadan* as between Indonesia and Malaysia". We understand Indonesia to be saying that the

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[1] CR 2001/2, p. 10 (Wirajuda).

[2] CR 2001/2, p. 13 (Pellet).

[3] CR 2001/2, p. 33 (Bundy).

determination of sovereignty over Sipadan and Ligitan cannot but make reference to (1) pivotal aspects of the Philippine claim to North Borneo; and (2) the Philippine view that the legal status of North Borneo is necessarily implicated in the determination of the issue of sovereignty in the case between Indonesia and Malaysia.

4. Evidently, the chain of title which Malaysia asserts to defend its territorial claim to Sipadan and Ligitan, based as it is on its own interpretations of, and representations on, specific treaties, agreements and other documents, is linked to the chain of title which the Philippines relies on to defend its territorial claim to North Borneo. Allow me to elaborate on and explore the details of this "ramification", as counsel Bundy has described it.

5. Malaysia has specified at least four treaties and agreements which it argues have a direct bearing on the sovereignty issue involving Sipadan and Ligitan. If we relate Malaysia's submission to Indonesia's regarding the chain of title alleged by Malaysia to support the Malaysian claim, then we will have a fair view of what the prejudice to the Philippine interest would look like. I say *if*, because the Philippines has not seen the pleadings of Malaysia.

6. Indonesia[4] says that Malaysia's sovereignty claim over Sipadan and Ligitan is based on a theory of ownership, or chain of title, which follows this chronology: originally, the two islands in question belonged to the Sultan of Sulu. Sometime in the nineteenth century, the Sultan's title was transferred to Spain, who in turn transferred its title to the United States via the Treaty of 7 November 1900. And then, through the 1930 Anglo-United States Convention, the United States transferred its title to Great Britain, the predecessor-in-interest of present-day Malaysia.

Now Malaysia says[5] that the Parties have submitted four legal instruments, among many others we presume, in order to prove their respective claims before the Court. These legal instruments are:

— the 1891 Anglo-Dutch Agreement;

— the 1900 Spain-United States Convention;

— the 1907 United States-United Kingdom Exchange of Notes; and

— the 1930 United States-United Kingdom Convention.

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[4] CR 2001/2, p. 33 (Bundy).

[5] CR 2001/2, p. 51, para. 31 (Cot).

Two points in the Malaysian chain of title described by Indonesia, 1900 and 1930, correspond to two agreements cited by Malaysia: the 1900 United States-Spain Convention and the 1930 United States-United Kingdom Convention. Now what if the Court upholds the interpretation of these international agreements suggested by Malaysia?

7. Let us focus on the 1930 United States-United Kingdom Agreement. This is a crucial legal instrument because *if* the Malaysian submission as alleged by Indonesia is correct — and we need to verify this from the Malaysian pleadings — then Malaysia is claiming that Britain obtained title to Sipadan and Ligitan by way of cession from the United States in 1930. This is of course the presumed Malaysian interpretation of the 1930 Agreement. The Philippines opposes this interpretation and submits the following.

8. First, the Philippines has a direct legal interest in the interpretation of the 1930 United States-United Kingdom boundary, being the successor-in-interest of one party to that agreement, the United States.

9. Secondly, the 1930 Agreement cannot be construed in any way as an instrument of cession. As we have explained, the purpose and overall intention of this Agreement was simply to delineate boundaries between, on the one hand, United States territory[6] and territory that "belong to the State of North Borneo which is under British protection", on the other hand. The question of United Kingdom title over territory referred to in the 1930 Convention, or the Exchange of Notes accompanying it, never arose. The legal situation, as we illustrated last Monday, parallels the one obtaining when the 1891 Anglo-Dutch Agreement was concluded. The 1891 Agreement draws a boundary line between, or segregates, "Netherlands possessions" on the one hand, and the territory of the "States under protection", on the other. The independent State of Sabah under British protection in 1891 was the same independent State of Sabah under British protection referred to in the 1930 United States-United Kingdom Agreement. The Philippines also clearly demonstrated that the independent State of Sabah from 1891 up to 1930, and beyond, was under the administration of the British North Borneo Company by virtue of delegated authority from the Sultan of Sulu, in whom the sovereignty of North Borneo vested.

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[6] Or, "the Philippine archipelago".

10. Thirdly, neither the Agent nor counsel for Malaysia in their presentation last Tuesday dwelt on the question of the legal capacity of the United Kingdom to enter into agreements respecting North Borneo from 1878 up to 1946. The Philippines, therefore, takes this to mean that Malaysia accepts *(a)* the Philippine characterization of the legal status of the United Kingdom Government in North Borneo during this period, and *(b)* the fact that North Borneo was territory under the indisputable sovereignty of the Sultan of Sulu, which was administered by the BNBC, and *(c)* the understanding expressly made in the 1907 Exchange of Notes that "the privilege of administration" on the part of the BNBC "does not carry with it territorial rights". No amount of selective memory can modify or revise the intent of the 1930 Agreement. Britain could not have acquired sovereignty over Sipadan and Ligitan by virtue of the interpretation placed by Malaysia on the 1930 United States-United Kingdom Agreement.

11. Because, as the Philippines contends, the Sultan of Sulu enjoyed continuous, uninterrupted and internationally recognized *de jure* sovereignty over North Borneo during the whole period of 1878 and 1962, then it follows that the two islands in question were acquired by the United Kingdom in 1930 for and on behalf of the Sultan of Sulu. The two islands which were lost to the Sultan as part of his dominion in the nineteenth century reverted back to the Sultanate in 1930!

12. May I state that the territory ceded by the Sultan to the Philippines in 1962 covered only those territories which were included and described in the 1878 Sulu-Overbeck lease agreement. The present Application for permission to intervene is based solely on the rights of the Government of the Republic of the Philippines transferred by and acquired from the Sulu Sultanate. If at all there are other territories appertaining to the Sultanate not covered by the Sulu-Overbeck lease of 1878, the Philippines, as agent and attorney for the Sultanate, has reserved its position on these territories[7].

### Reply to Malaysia

13. May I now turn to Malaysia's arguments against the Philippines formulation of its interest of a legal nature. The Malaysian arguments rest on the critical proposition that the

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[7] This reservation was first made during the Anglo-Philippines Ministerial Talks held in London in 1963. See The Philippine Claim to North Borneo, Vol. II (Manila: Bureau of Printing, 1968), p. 2.

Philippines does not have any relevant "interest of a legal nature" in the present proceedings because ultimately the Philippine claim to North Borneo is unfounded and has no legal basis[8]. I believe that I have already laid down before the Court the most salient elements of the Philippine claim and its historic rights to North Borneo, which we considered are necessary to fulfil the substantive requirements under Article 62. I have shown prima facie that there is a legal dispute between Malaysia, as successor-in-interest to Great Britain, on the one hand, and the Philippines, on the other, on the matter of the legal status of North Borneo. I need not go over this ground again. Allow me, however, to make three observations in reply to specific points raised by Malaysia last Tuesday about the validity of the Philippine territorial claim to North Borneo.

### The scope of the dispute on North Borneo

14. First, may I emphasize that the Philippines claim is not about the legitimacy of the Republic of Malaysia or of its constituent state Sabah or a claim that the latter's self-determination is invalid or somehow being put into question. The Republic of the Philippines accepts the validity of the State of Malaysia and its political components as evidenced by its diplomatic relations, in particular its participation in the ASEAN. The Philippine claim is a territorial claim on a portion of Sabah which properly belongs to the Philippines on the basis of a sound title *jure gentium* and which Malaysia is improperly occupying on the basis of a faulty title which had been transferred to it by a prior faulty titleholder. Nothing in the confirmation of self-determination of the people of Sabah by the Secretary-General of the United Nations or the admission of Malaysia to the United Nations imported more than a confirmation by the international community of Malaysia's political identity. This is the case of every admission to the United Nations. None of those actions signified an international confirmation of Malaysia's claims to territory that may have been contested. So Malaysia's arguments about self-determination, or the non-negotiability of the "future of the people of Sabah", are irrelevant, as they are not in issue in the Philippine claim, and Malaysia's attempts to attribute designs against its political character by the Philippines are unfounded. In sum, the Philippines is not claiming all of Sabah or contesting its political legitimacy. The Republic of the

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[8] CR 2001/2, p. 39 (Mohamad); CR 2001/2, p. 48, para. 16 (Cot); CR 2001/2, p. 55, para. 6 (Lauterpacht).

Philippines is claiming a piece of territory in North Borneo. At its core, that claim must be assessed by examination of the chain of title.

### Agreements on the legal status of North Borneo

15. Secondly, there seems to have been a misreading of the Philippine arguments presented last Monday regarding the Philippine position on the legal status of North Borneo. For instance, counsel Cot identifies four legal instruments[9] which, according to Malaysia, have been relied upon by one or both of the Parties to prove their case: (1) the 1891 Anglo-Dutch Boundary Agreement as supplemented by agreements in 1915 and 1928; (2) the 1900 United States-Spain treaty; (3) the 1907 Anglo-United States Exchange of Notes; and (4) the 1930 United States-United Kingdom boundary agreement. It is not true that we have failed to refer to any of these legal instruments in the course of our explanation of the Philippine claim on North Borneo[10]. We have cited three of these agreements in the context of the overall argument that we wanted to make, namely, that these agreements are part of an interconnected set of legal instruments which if appreciated in their proper normative context would definitely oppose any title of sovereignty over North Borneo on the part of Britain, or its successor-in-interest, Malaysia.

16. The assertion has also been made that the Philippines has acknowledged in four instances British title over North Borneo[11]. Counsel Lauterpacht cites the fact that the Philippines had done so when it entered into several arrangements with the United Kingdom: the two on air services, one on labour employment, and a fourth one which consists of an Exchange of Notes regarding a British Government request to the Philippines concerning a lighthouse situated on a certain island under Philippine sovereignty. The Philippines does not see how specialized bilateral agreements with respect to air services or labour employment, or a proposal on the maintenance of a lighthouse, variously taking place in the period 1948 to 1955, can possibly be invoked against the Philippines as a recognition of, or acquiescence to, British title over North Borneo. Moreover, this misconstrues the basic theory behind the Philippine claim to North Borneo. As I have explained last Monday, the title of the Philippines to North Borneo is based on the cession effected by the

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[9] CR 2001/2, p. 51, para. 31 (Cot).

[10] See CR 2001/2, p. 51, para. 32 (Cot).

[11] CR 2001/2, p. 56, para. 11 (Lauterpacht).

Sultanate of Sulu in favour of the Philippines of certain territory in North Borneo. Legally and logically, the Philippines can only be in a position to question British pretensions to sovereignty over North Borneo *after* that cession has taken place in 1962.

### The Philippines theory of sovereign title over North Borneo

17. This leads me to my third point: the Philippines claim to North Borneo could only have been possible in 1962, after the Sultanate of Sulu finally ceded North Borneo to the Philippines. Of course, this position is drastically opposed to the Malaysian contention that the Sultanate of Sulu "disappeared" as a legal entity several times. According to counsel Lauterpacht, the Sulu Sultanate "disappeared" or was "abolished" as an entity in 1878 as a result of Spanish conquest, again in 1915 under unknown circumstances during the American régime, and then again in 1936 by an undefined act on the part of the United States, and then once again in 1936, with the death of the Sultan[12]. We may add another date of demise of the Sultan — in 1946, when Britain unilaterally abolished the Sulu Sultanate by annexing North Borneo to become a British colony.

18. An awareness of the critical date when North Borneo was ceded to the Philippines will necessarily dispose of the argument further put forward by counsel Lauterpacht that the Philippines slept on its rights or could have protested against Britain but then chose to remain silent. Counsel Lauterpacht mentions that the Philippines could have opposed British pretension of title to North Borneo in 1947, when an American adviser to the Philippine President urged the Philippine Government to repudiate the British North Borneo Cession Order of 1946. Also in 1947, according to him, the Philippine Constitution was ratified in a plebiscite. All these instances of alleged neglect of right took place *before* the Philippine Government had acquired the territorial rights over North Borneo from the Sultanate. Many of the assertions are, in addition, wrong.

19. Counsel Lauterpacht has faulted the Philippines for enacting the Baseline Law in 1961 with "no mention of any Philippine claim to North Borneo". It should be obvious now why this claim could not have been provided in that law, at that time, for it was not until 1962 that title to territory in North Borneo became vested in the Philippines. The Philippines duly amended

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[12] See CR 2001/2, pp. 57 and 58, paras. 12 and 15 (Lauterpacht).

this 1961 law in 1968. Republic Act 5446, amending Republic Act 3046 of 1961, now provides that the "Philippines has acquired dominion and sovereignty" over Sabah, situated in North Borneo.

20. Starting in 1962, the Philippine claim to sovereignty and dominion over a portion of North Borneo became a legal right. If asserted before that date, it could have been rightly characterized as a political claim. After the act of cession from the Sultanate, the Philippines acquired rights over the territory of North Borneo which the Philippines was duty-bound as a sovereign to protect and preserve.

**The absence of a basis for Malaysian title to North Borneo, Malaysia's recognition of the Philippine claim, and its obligation to settle the North Borneo dispute by peaceful means**

21. Allow me, Mr. President, Members of the Court, to go into some specifics regarding Malaysia's attitude to the Philippine claim. In our pleadings last Monday 25 June 2001, we outlined to the Court as briefly as we could the historical basis of the Philippine claim to certain territories in North Borneo, because the legal basis of that claim is intricately intertwined with that history. At the same time, in doing this, we have shown that the British Government, as well as its successor-in-interest, Malaysia, on the same historical and legal considerations could not have acquired sovereign title to North Borneo.

22. Now, counsel Lauterpacht, tells us that in such an effort "the Philippines misunderstands the basis of British and now Malaysian title to North Borneo". He thus rejected reference to the past and would now rely on contemporaneous support for British and/or Malaysian title. He said "that title is not now dependent in any way upon nineteenth century grants or treaties". Unable to explain how the British Government derived its sovereign title to North Borneo, it is of course convenient for him to dismiss the past.

23. Counsel Lauterpacht enumerated a number of points in an attempt to provide a contemporaneous basis for such assumed title. However, these points are based largely on a misconception of the nature of the Philippine claim.

24. For example, counsel Lauterpacht has charged the Philippines not only of sleeping on its rights since 1946 but of making a claim based on "a hundred years of absence" from North Borneo. In response, we again have to recall our basic proposition that the Philippine territorial claim is based on the transfer of dominion and sovereignty over a portion of North Borneo to the Philippine

Government by the Sultanate of Sulu in 1962. Hence, reference to events and transactions before this cession in 1962 by way of imputing to the Philippines failure to assert territorial rights is misplaced.

25. Secondly, counsel Lauterpacht also refers to a Constitution of 1947 which does not exist, and to a plebiscite on national territory — but there was none.

26. Thirdly, in connection with the 1930 United States-United Kingdom Convention, even if it were timely for the Philippines to have affirmed its territorial claim by refraining from making reference to the said United States-United Kingdom treaty in this Constitution, there was not much good reason to do so, because, as admitted by counsel Lauterpacht, the treaty mentions the "State of North Borneo" as merely "under British protection", not under "British title".

27. Fourthly, counsel Lauterpacht should have referred to the 1935 Constitution which provided reference to the aforementioned United States-United Kingdom treaty, but at that time, the Philippines did not have the status of an independent and sovereign State and could hardly make a claim. Moreover, the 1935 Constitution came about 27 years before the cession of North Borneo by the Sultan of Sulu in favour of the Philippines, and while lease payments were still being made.

28. So now we know that the title of Malaysia over Borneo is fragile, and that the Philippine claim has been asserted at the most appropriate time. What does the history of the claim further tell us about the merits of the claim? According to counsel Lauterpacht, the claim is "so manifestly defective", but if he takes the time to study the Malaysian posture towards the claim, the conclusion we reach is otherwise. Malaysia had, on many occasions not only acknowledged that there is a claim, but that it is a claim that should be settled as soon as possible, and not precluding reference to the International Court of Justice.

29. Thus, in February 1964, the Malaysian Prime Minister reached an understanding with the Philippine President to discuss — according to their communiqué — "as soon as possible the best way of settling the dispute, not precluding reference to the International Court of Justice". In August 1964, the Malaysian and Philippine Governments agreed, in an exchange of aides-mémoires to a meeting of their representatives in Bangkok for the purpose of clarifying the Philippine claim and of discussing the means of settling the dispute. In February 1966, the

Philippines, responding [illegible] Malaysia's diplomatic Note reiterating its assurance to abide by the Manila Accord and the Joint Statement, proposed "that both Governments agree as soon as possible on a mode of settlement that is *mutually* acceptable to both parties". In June 1966, the two Governments, in a joint communiqué, agreed once again to abide by the Manila Accord and the Joint Statement, and they reiterated their common purpose to clarify the Philippine claim and the means of settling it. In August 1968, again in a joint communiqué, the two Governments agreed that talks on an official level would be held as soon as feasible regarding the Philippine claim to Sabah. In May 1968, the two Governments exchanged diplomatic Notes in which they agreed to hold talks on an official level on the Philippine claim and the best means of settling the dispute between them. On the occasion of the Bangkok talks, in July 1968, the Philippine delegation presented the Malaysian delegation with a written question: "Will you discuss with us the modes of settlement of our claim at this conference here in Bangkok, irrespective of your own unilateral assessment of the sufficiency of the clarification given?" The answer of Malaysia was unqualifiedly in the affirmative.

30. These efforts are *not* marked by unilateral acts on the part of the Philippines. They are recorded as undertaken jointly by Malaysia and the Philippines. They repeatedly convey Malaysia's recognition of the existence of a Philippine claim to North Borneo and Malaysia's willingness to settle the dispute occasioned by this claim peacefully and amicably.

31. And last but not the least, what do we make of counsel Lauterpacht's allegation that the Philippines is "unwilling to face up to the implications of proper litigation proceedings to a judgment by which as a party it would be bound"[11]? We only have to check the historical record to prove that his allegation is wrong.

32. What really happened? In the face of the growing demand in the Philippines to take steps towards the enforcement of the Philippine claim to a portion of North Borneo, it was the British Government, in an aide-mémoire to the Philippine Government dated 24 May 1962, who expressed firm resistance — and I quote from the aide-mémoire — "to any claim to part of North Borneo, whether advanced by the Philippine Government or by private persons in the Philippines".

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[11] CR 2001/2, p. 61, para. 23 (Lauterpacht).

This was accompanied by a threat, in the same aide-mémoire, that a public dispute with the Philippine Government about North Borneo — and I quote again from the aide-mémoire — "would impair the present friendly relations between Great Britain and her ally, the Philippine Republic". These are not words that a small new State can treat lightly.

33. In the Anglo-Philippine Talks held in London in February 1963, on the initiative of the Philippines, the Philippine and British delegations devoted extensive discussion to the Philippine claim to North Borneo. In these talks, the Philippines proposed that the legal dispute over North Borneo be submitted to the International Court of Justice. This proposal was reiterated a month later in meetings between the two governments held in Manila. In August 1963, the Philippine Secretary of Foreign Affairs, formally proposed once again submission of the dispute to this Court[14].

34. Again in 1963, the Philippine Secretary of Foreign Affairs sent a Note to the Malaysian Ambassador in Manila requesting assistance "to secure the agreement of the British Government to the submission of the dispute over North Borneo to the jurisdiction of the International Court of Justice". A similar note was addressed to the Indonesian Ambassador in Manila.

35. In a policy statement before the Twenty-Fourth Session of the United Nations General Assembly, the Philippine Secretary of Foreign Affairs reiterated the proposal to submit the claim to North Borneo to the International Court of Justice. The following year in 1970, the Philippine Secretary of Foreign Affairs, again before the United Nations General Assembly, expressed the hope that Malaysia would agree to submit the Philippine claim to North Borneo to the International Court of Justice.

36. Earlier, in October 1968 at the United Nations General Assembly, the Philippines challenged Malaysia to go to the International Court of Justice with the Philippines for the settlement of the claim. This was in response to Malaysia's attack on the Philippine claim, describing it, to quote the Malaysian delegate: "a composite of fantasy, fallacy and fiction". These are words echoed last Tuesday by counsel Lauterpacht, who described the Philippine claim as a

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[14] It was proposed "that the two governments agree to enter into a special agreement to refer the dispute between them to the International Court of Justice, so that it should decide whether the sovereignty and dominion over North Borneo belong to the Republic of the Philippines or to Her Majesty's Government". Philippine Note, dated 21 August 1963, addressed to Theo Peters, *Chargé d'Affaires*, British Embassy, Manila. Text in Philippine Claim to North Borneo, Vol. II, Manila: Bureau of Printing, 1968), pp. 112-113.

"pretence" and as "manifestly defective". But what do the facts establish? The "pretence" is Malaysia's avowal that it recognizes the Philippine claim as well as its duty to settle the North Borneo dispute in a peaceful manner.

### Conclusion

37. Mr. President, Members of the Court. I would like to close by recalling a remark of Mr. Lauterpacht in his presentation to you on Tuesday. He quoted to you a Latin maxim to the effect that *ex factis jus*. It is a chilling and cynical maxim, the very antithesis of law, for what it says is that might makes right. Judge Lauterpacht, formerly of this great Court, said the opposite. His maxim was *ex delicto non oritur jus*. Rights do not rise from delicts. My country believes in international law and has turned to the International Court of Justice with confidence that it is the Court's mission to ensure that law, and not naked power, prevail. Allow me, Mr. President, Members of the Court to request you to hear our Agent, Ambassador Eloy Bello, in his closing statement on behalf of the Republic of the Philippines. Thank you for your kind attention.

Le PRESIDENT : *Je vous remercie beaucoup Monsieur le professeur.* I now give the floor to Ambassador Eloy Bello, Agent of the Republic of the Philippines.

Mr. BELLO:

1. Mr. President, Members of the Court. On behalf of the Republic of the Philippines, I would like to thank the Court for the opportunity to present my Government's reasons for its Application for permission to intervene in the case concerning *Sovereignty over Pulau Sipadan and Pulau Ligitan*. As I said in my opening remarks, this is a matter of great importance to the Republic of the Philippines and it is deeply conscious, as am I, of the honour to appear before the Court.

2. Counsel for the Philippines have dealt with the legal arguments that have been lodged against our Application to intervene, but one argument by our adversaries involves a political criticism of my Government, to which I feel I am duty bound to respond. It has been alleged, not that the Philippines violated a deadline prescribed by the Court, which is not correct, but rather that it submitted its requests, both for documents and then to intervene, in an untimely way. While our

counsel have refuted that allegation, I should like to say that my Government proceeded in a careful and deliberative manner, consistent with our respect for the Court and our amicable relations with Malaysia and the Republic of Indonesia and our appreciation that intervention in the International Court of Justice is a momentous step. I reject, and I know that the Court will reject, any intimation that the Philippines request is some sort of adventure or part of a political propaganda.

3. On behalf of the Republic of the Philippines, I should like to restate the remedy which my Government requests from the Court in this intervention. Accordingly, we ask for the remedy in Article 85,

— paragraph 1: "the intervening State shall be supplied with copies of the pleadings and documents annexed and shall be entitled to submit a written statement within a time-limit to be fixed by the Court"; and

— paragraph 3: that "the intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention".

As counsel have said, if our examination of the documents dispels the concerns that have been raised by the Special Agreement and several paragraphs in the Malaysian observations, the Philippines will inform the Court of that fact and will not exercise either of the remedies made available to it.

4. Mr. President, Members of the Court, in closing, I wish to invite the attention of the Court to the fact that the Philippine Application for permission to intervene arises out of the broad setting of unsettled territorial disputes in our region which are a dim legacy of Western imperial and colonial rule. This should be a reminder to countries like Indonesia, Malaysia and the Philippines that the meaningful resolution of these issues very much involves the challenge of creatively applying and patiently pursuing legal and pacific approaches to the settlement of inherited political disputes. It is in this context that the Philippines appreciates the role of the Court as doubly significant: providing not only a venue for the authoritative vindication of claims but also a forum for inclusive dialogue and comprehensive conflict resolution in the post-colonial world of the twenty-first century. Thank you, Mr. President, Members of the Court.

**The PRESIDENT:** Thank you, Mr. Ambassador. Ceci conclut le deuxième tour de plaidoiries de la République des Philippines. La Cour prend acte des conclusions finales dont vous avez donné lecture au nom des Philippines. La Cour se réunira à nouveau demain vendredi 29 juin à 10 heures pour le second tour de plaidoiries de l'Indonésie et de la Malaisie. Je vous remercie. La séance est levée.

*L'audience est levée à 11 h 10.*

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CR 2001/4

**International Court**
**of Justice**

**THE HAGUE**

**Cour internationale**
**de Justice**

**LA HAYE**

## YEAR 2001

***Public sitting***

***held on Friday 29 June 2001, at 10 a.m., at the Peace Palace,***

***President Guillaume presiding***

***in the case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan***
***(Indonesia/Malaysia)***

***Application for permission to intervene filed by the Republic of the Philippines***

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## VERBATIM RECORD

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## ANNÉE 2001

***Audience publique***

***tenue le vendredi 29 juin 2001, à 10 heures, au Palais de la Paix,***

***sous la présidence de M. Guillaume, président***

***en l'affaire relative à la Souveraineté sur Pulau Ligitan et Pulau Sipadan***
***(Indonésie/Malaisie)***

***Requête à fin d'intervention déposée par la République des Philippines***

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## COMPTE RENDU

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|---|---|---|
| *Present:* | **President** | **Guillaume** |
| | **Vice-President** | **Shi** |
| | **Judges** | **Oda**<br>**Bedjaoui**<br>**Ranjeva**<br>**Herczegh**<br>**Fleischhauer**<br>**Koroma**<br>**Vereshchetin**<br>**Higgins**<br>**Parra-Aranguren**<br>**Kooijmans**<br>**Rezek**<br>**Al-Khasawneh**<br>**Buergenthal** |
| | **Judges *ad hoc*** | **Weeramantry**<br>**Franck** |
| | **Registrar** | **Couvreur** |

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*The Government of the Republic of the Philippines is represented by:*

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Mr. Alejandro B. Mosquera, Assistant Secretary, Office of Legal Affairs, Department of Foreign Affairs,

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**Mr. Raja Aznam Nazrin, Counsellor of the Embassy of Malaysia in the Netherlands,**

**Mr. Nik Aziz Nik Yahya, First Secretary of the Embassy of Malaysia in the Philippines,**

**Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Division, Department of Survey and Mapping, Malaysia,**

**Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,**

**Mr. Shaharuddin Onn, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,**

***as administrative staff.***

Le PRESIDENT : Veuillez vous asseoir. La Cour est réunie ce matin pour entendre le second tour de plaidoiries de l'Indonésie et de la Malaisie et je donnerai d'abord la parole au représentant de l'Indonésie et à M. Rodman Bundy.

Mr. BUNDY: Merci M. le Président. Mr. President, Members of the Court, my task this morning is to deal with two aspects of the Philippine presentation we heard yesterday: *first*, I will comment on the question whether the Application has been filed in a timely fashion; and *second*, I will seek to clarify a number of misunderstandings which the Philippines appears to entertain with respect to the practical effect of the Application for purposes of the merits of the case.

First, to the question of timeliness.

### 1. The question of timeliness

Yesterday, I listened with interest to the distinguished Agent of the Philippines when he stated that, in bringing the Application, his Government had proceeded in a careful and deliberate fashion (CR 2001/3, p. 31). Nonetheless, after listening to Prof. Reisman, yesterday, on the issue of timeliness, Indonesia still considers that the Application does not comport with the letter or spirit of the Rules of Court and the Court's clear trend recently to encourage the expedition of proceedings.

Prof. Reisman argued that it is important to relate the Application to the Philippines request under Article 53 of the Rules for copies of the written pleadings in the case (CR 2001/3, p. 17, para. 17). Prof. Reisman asked: "When would Indonesia expect the request under Article 53 to come? Before the Parties had made their written submissions?" *(Ibid.)*

No, Mr. President, not before the Parties had made their written submissions. But at least in sufficient time so that the Court could have taken a decision on the matter before the Parties were due to file their final written pleadings, their replies in the case. This would have been in keeping with the Rules and would have permitted the Philippines to file a timely application.

In point of fact, the answer to Prof. Reisman's question lies in the past practice of parties in previous intervention cases.

In the *Tunisia/Libya* case, for example, Malta requested the written pleadings five months, five months before the parties were due to file their Counter-Memorials. Because the Court first had to ascertain the views of the parties before deciding whether to grant that request — and that took two months — nonetheless this still left Malta with ample time to file a timely application.

Now in the *Libya/Malta* case, Italy requested the pleadings four and a-half months before the parties were due to file their Counter-Memorials. And Italy too, had no problem in filing a timely request for permission to intervene.

Since both the Maltese and Italian requests for the documents were denied, I have a hard time understanding how Prof. Reisman can now maintain that this case that we are arguing here this week, is a case of first impression because the Philippines has been denied access to the pleadings. It's not a case of first impression (CR 2001/3, p. 17, para. 20).

In the *El Salvador/Honduras* case, Nicaragua requested the pleadings two years before the final written submissions were due. It had no problems meeting the timeliness deadline for filing an application. And neither, more recently, did Equatorial Guinea.

Yet the Philippines waited until a mere *eight* days, just *eight days* before the Parties' Replies were due to be filed. And given that the Court had first to ascertain the views of the Parties before deciding whether or not to grant that request, the fact that the request came a mere eight days before the final replies were due, made it, for all practical purposes, impossible for the Philippines to know whether it would be given access to the pleadings before the Parties had completed their final submissions.

Yesterday, both Prof. Reisman and the Philippines Agent referred to Article 85 of the Rules — specifically, to the provision in paragraph 1 of Article 85 that provides that a State whose intervention request is granted is then thereafter given access to the written pleadings in the case. It seems to me, Mr. President, that this provision alone would have been sufficient to put the Philippines on notice that it could not presume that it would have access to the written pleadings prior to the filing of its Application. So the question remains: why did the Philippines not act earlier?

Is it right for Indonesia and Malaysia to be placed in the position in which they find themselves today due to the Philippines delay in submitting its Application? After all, the recent trend, which is evidenced by various amendments to the Court's Rules, is for the Court to make the proceedings more efficient. I referred on Tuesday to the 1978 amendment of the Rules which provided for tighter deadlines for the filing of applications to intervene. I might also refer in this respect to the Court's recent amendment of Article 79 of the Rules of Court, dealing with the time-limits for filing preliminary objections. Both of these amendments point to a trend — I would suggest — a trend by the Court to expedite its proceedings. The late filing of the Philippines Application, Indonesia would suggest, neither comports with this trend but it is one factor which Indonesia submits should be taken into account in assessing whether the Application should be granted.

### 2. The Philippines misrepresents the implications of its Application for the merits of the case

As for my second point, Mr. President, this concerns the use that the Philippines has tried to make of my remarks on Tuesday concerning the implications of the Application for the merits of the case.

I shall, in particular, deal with two points raised by Prof. Magallona.

First, the distinguished professor claimed that while Indonesia purports to adopt an attitude of disinterest on the merits of the Philippines claim to North Borneo, Indonesia has in fact invoked the merits of that claim in its case against Malaysia. In counsel's words:

> "Indonesia recognizes the positive merits of the Philippine claim to North Borneo that 'flow from the Philippines Application and Malaysia's reaction to it which have a fundamental bearing on the issue of sovereignty over the islands of Ligitan and Sipadan'" (CR 2001/3, p. 19, para. 3).

I will explain presently why the premise which underlies this argument is incorrect. But first, let me note that counsel went on to assert that what Indonesia was in effect saying was that the determination of sovereignty over Sipadan and Ligitan cannot fail but make a reference to "(1) pivotal aspects of the Philippine claim to North Borneo; and (2) the Philippine view that the legal status of North Borneo is necessarily implicated in the determination of . . . sovereignty . . . as between Indonesia and Malaysia" (CR 2001/3, pp. 19-20, para. 3).

I regret to say that the Philippines, perhaps due to my shortcomings, appears to have completely misunderstood the thrust of my intervention on Tuesday. First of all, there is no question of Indonesia having recognized "the positive merits of the Philippine claim to North

Borneo". Indonesia has not deemed it appropriate to take any position on the merits of that claim: and the claim, such as it is, is a matter between the Philippines and Malaysia. Indonesia is not involved.

Secondly, the determination of sovereignty over Sipadan and Ligitan as between Indonesia and Malaysia *in no way* depends on the Philippine claim to North Borneo.

When I spoke on Tuesday about the implications of the Philippine Application for the merits of the case, I was not referring to the Philippine claim to North Borneo. My point was a very simple one. It was, as the Court has repeatedly been told, that the Philippines has expressly disavowed any title or sovereignty to the islands of Sipadan and Ligitan: and it is this absence of any Philippine claim to the islands which, as I explained, has implications for the merits of the case. But that has nothing to do with the separate question of the legal status of North Borneo.

It is precisely because the Philippines does not lay claim to the islands of Sipadan and Ligitan that it cannot be said to have an interest of a legal nature which may be affected by a decision in the case. No implications for the Philippines claim to North Borneo will flow from a determination by this Court of the issue of sovereignty over the islands. Sipadan and Ligitan are simply not part of the Philippines claim.

That leads me to my second point. For, while in its Note Verbale and in its first round presentation the Philippines could not have been clearer as to its lack of interest in either of the two islands, I was concerned to hear in Prof. Magallona's intervention yesterday a hint of hesitation over this point. Let me just recall what the distinguished professor had to say:

> "Because, as the Philippines contends, the Sultan of Sulu enjoyed continuous, uninterrupted and internationally recognized *de jure* sovereignty over North Borneo during the whole period of 1878 and 1962, then it follows that the two islands in question [Sipadan and Ligitan] were acquired by the United Kingdom in 1930 for and on behalf of the Sultan of Sulu." (CR 2001/3, p. 22, para. 11.)

Counsel went on to say:

> "If at all there are other territories appertaining to the Sultanate not covered by the Sulu-Overbeck lease of 1878, the Philippines, as agent and attorney for the Sultanate, has reserved its position on these territories." (*Ibid.*, para. 12.)

Mr. President, at the appropriate time I have promised to my colleague and friend, Prof. Pellet, that I will attempt to unravel for him the mysteries of the doctrine of estoppel, but I suspect that this is probably not the best time to do so. Nonetheless, whether one speaks of estoppel, or good faith, or the prohibition against a State blowing hot and cold at the same time, the position is the same.

The Philippines is on record as having expressly disclaimed any territorial interest in either Sipadan or Ligitan. If the famous Note Verbale is not enough, then let us recall the words of Prof. Reisman on Monday: he said "This is not a Philippine claim for the islands" (CR 2001/1, p. 27, para. 28). And he added: "Indonesia correctly observes that the Philippines is not interested in the outcome of Ligitan and Sipadan" (CR 2001/1, p. 30, para. 43). Does Prof. Magallona now purport to take issue with his Government's diplomatic Note or with the affirmations that Prof. Reisman made on Monday?

At the end of the day, Mr. President, the position is clear. The case between Indonesia and Malaysia concerns sovereignty over Sipadan and Ligitan. The Philippines has no claim in that matter. Their concern is over the status of North Borneo. But that is not the subject-matter of the dispute before the Court. Nor is the legal status of North Borneo in any way implicated by the question of sovereignty over the islands, or affected by the Philippines lack of interest in either of the two islands.

Mr. President, that concludes my brief remarks, and I would be grateful if you could now call on Professor Pellet to continue with Indonesia's presentation.

The PRESIDENT: Thank you very much, Mr. Bundy. Et j'appelle maintenant à la barre le professeur Alain Pellet.

M. PELLET : Merci beaucoup, Monsieur le président.

Monsieur le président, Madame et Messieurs les juges,

Tout à fait à la fin de son intervention d'hier matin, l'agent de la République des Philippines a attiré l'attention de la Cour «to the fact that the Philippine Application for permission to intervene arises out of the broad setting of unsettled territorial issues in our region which are a dire legacy of Western imperial and colonial rule» (CR 2001/3, 28 juin 2001, p. 31, par. 4).

Ceci est le reflet de la pure vérité. Mais cela pose avec acuité la question de savoir si tel peut être l'objet légitime d'une intervention au titre de l'article 62 de votre Statut. A cette question, l'Indonésie croit qu'il faut fermement répondre par la négative.

Il va de soi qu'en s'acquittant de sa mission, qui est «de régler conformément au droit international les différends qui lui sont soumis», la Cour contribue à éviter que certains litiges s'enveniment et empêche certainement que d'autres surviennent. Je me réfère, par exemple, à la très remarquable présentation de sir Robert Jennings lors du colloque qui a marqué le cinquantième anniversaire de la Cour, dans laquelle il a fait part de sa conviction selon laquelle :

> «Properly understood, the adjudicative process can serve, not only to resolve classical legal disputes, but it can also serve as an important tool of preventive diplomacy in more complex situations.» («Contribution of the Court to the Resolution of International Tensions» *in* Connie Peck and Roy S. Lee eds., *Increasing the Effectiveness of the International Court of Justice*, Nijhoff/UNITAR, 1997, p. 79.)

Mais l'ancien président de votre haute juridiction d'ajouter aussitôt que ceci doit s'entendre par rapport au différend précis qui lui est soumis, dont la Cour opère «the reduction, or refinement, or compression» (p. 80); et, en réponse à une question, sir Robert a précisé : «I would be somewhat frightened of litigants coming and expecting something different than the strict application of the law.» (P. 93.)

C'est que, et je cite l'arrêt rendu dans l'affaire du *Cameroun septentrional*, «[l]a fonction de la Cour est de dire le droit, mais elle ne peut rendre des arrêts qu'à l'occasion de cas concrets dans lesquels il existe, au moment du jugement, un litige réel impliquant un conflit d'intérêts juridiques entre les Parties» (*C.I.J. Recueil 1963*, p. 33-34; voir aussi les arrêts du 20 décembre 1974 dans les affaires des *Essais nucléaires*, *C.I.J. Recueil 1974*, p. 270, par. 55, et p. 476, par. 58). Et ce n'est qu'en s'acquittant de *cette* mission, de *jurisdictio*, dans les cas particuliers qui lui sont déférés, que la Cour peut jouer le rôle préventif que les Philippines voudraient la voir accepter de jouer à titre principal. Oui, Monsieur le président, par son arrêt, la Cour réglera le différend qui oppose l'Indonésie à la Malaisie et l'empêchera de s'envenimer — et elle contribuera ainsi à apaiser les tensions dans la région. Mais ceci ne saurait justifier que, par la même occasion, la Cour se penche sur un autre différend, dont le seul lien avec l'affaire que le compromis de 1997 vous appelle à trancher est qu'il est, lui aussi, un élément du legs colonial.

D'autant plus — et l'Indonésie tient à le redire avec force —, qu'elle n'est, décidément, nullement concernée par ce différend — si différend il y a. En écoutant les plaidoiries des représentants des Philippines hier matin, nous nous sentions dans la position de Rosencrantz et Guildenstern — vous savez, Monsieur le président, ce sont ces deux personnages très secondaires d'Hamlet autour desquels Tom Stoppard a construit une pièce de théâtre, intitulée *Rosencrantz et Guildenstern are Dead*, dans laquelle les deux comparses sont placés au centre de l'action et voient le Roi, la Reine, Hamlet, se débattre dans des problèmes terribles auxquels ils ne comprennent rien et qui leur sont tout à fait étrangers. Et c'est bien par-dessus nos têtes de Guildenstern et Rosencrantz que les avocats de l'Indonésie se sont adressés, hier, directement et exclusivement à nos collègues de la Malaisie pour exposer leurs thèses relatives à la souveraineté sur Sabah.

Monsieur le président, l'Indonésie l'a déjà dit, elle tient à le redire : elle n'entend prendre aucune position sur le fond de la querelle entre ses deux voisins; elle n'entend même pas se prononcer sur la question de savoir s'il existe entre eux un différend au sens juridique du terme puisque, apparemment, les Philippines le soutiennent alors que la Malaisie le conteste. Ce dont elle a, en revanche, la très ferme conviction, c'est que, *si* un tel différend existe, il est, en tout cas, totalement distinct, par les parties qu'il oppose, son objet et les thèses en présence, de celui faisant l'objet de votre saisine par le compromis de 1997.

Il n'est pas du tout impossible que, dans le cadre de ce différend — ou de ce non-différend, peu importe — l'interprétation de certains des instruments que l'Indonésie ou la Malaisie, ou les deux, invoquent soient pertinents. Mais ceci ne suffit pas pour fonder un intérêt d'ordre juridique dont les Philippines pourraient se prévaloir pour justifier leur intervention.

Monsieur le président, le professeur Reisman a dit quelque chose de très extraordinaire à cet égard. Il a affirmé : «We find nothing in the precedents about the permissible scope of an intervention being determined by the language of the submission, but rather by the possible consequence of the Court's decision.» (CR 2001/3, 28 juin 2001, p. 15, par. 10.) Je crains que le professeur Reisman n'ait pas très bien cherché.

Certes, il faut que l'intérêt d'ordre juridique invoqué par l'Etat qui cherche à intervenir soit susceptible d'être affecté par la décision de la Cour (*«may be affected by the decision in the case»* précise le texte anglais de l'article 62). Mais il faut *aussi* que cet intérêt soit «pour lui *en cause*» dans la cause. Et comme je l'ai rappelé mardi dernier (CR 2001/2, 26 juin 2001, p. 20), la jurisprudence de la Cour combine soigneusement les deux versions de son Statut et tient compte *des deux* exigences.

Pour déterminer si un intérêt est effectivement en cause pour l'Etat auteur de la requête à fin d'intervention, il convient donc de confronter celle-ci aux demandes des Parties à l'instance principale. La Cour l'a dit avec une très grande clarté lorsqu'elle a écarté l'intervention de l'Italie dans l'affaire *Libye/Malte* : «Normalement, la portée de[illegible]cisions de la Cour est définie par les prétentions ou conclusions des parties...» Et c'est par rapport à ces prétentions, éventuellement telles que la Cour les a «circonscrites» (cf. les arrêts du 20 décembre 1974 dans les affaires des *Essais nucléaires*, *C.I.J. Recueil 1974*, p. 262, par. 29 et p. 466, par. 30), que votre haute juridiction apprécie la portée de l'intervention en tenant compte de toutes les circonstances, en même temps — et c'est ce qui nous intéresse plus particulièrement ici —, *«que de la nature de l'objet de l'instance introduite»* par les Parties à l'affaire principale (arrêt du 21 mars 1984, requête de l'Italie à fin d'intervention dans l'affaire du *Plateau continental (Jamahiriya arabe libyenne/Malte)*, *C.I.J. Recueil 1984*, p. 19, par. 29).

Or les Philippines ont formellement donné à l'Indonésie l'assurance qu'elles n'avaient aucune revendication à faire valoir sur Ligitan et Sipadan dans la note du 5 avril dernier annexée aux observations écrites de la République d'Indonésie et elles l'ont répété en plaidoirie (voir encore CR 2001/3, 28 juin 2001, p. 10, par. 2 (M. Reisman)). Ce faisant, elles reconnaissent que leur requête à fin d'intervention est dépourvue de tout lien avec l'objet de l'instance pendante devant la Cour. Or, je le répète, ceci est l'une des deux conditions indispensables que doit présenter une requête à fin d'intervention pour être admise.

Ceci étant, force est de constater que l'autre condition mise par l'article 62 du Statut à l'accueil d'une requête en intervention qui a seule retenue l'attention de nos amis philippins, n'est pas davantage remplie : quelle qu'elle soit, la décision de la Cour ne pourra être de nature à affecter un intérêt juridique de la République des Philippines.

Selon eux, l'interprétation des traités et accords sur lesquels les Parties s'appuient (ou pourraient s'appuyer) pour établir leurs droits sur Ligitan et Sipadan «will certainly affect the

Philippines interest» (CR 2001/3, 28 juin 2001, p. 14, par. 8 (Reisman)) Rien, Monsieur le président, n'est moins certain !

Que nous ont dit les professeurs Reisman et Magallona pour vous en convaincre ? Essentiellement que les revendications philippines sur le nord de Bornéo pouvaient dépendre de l'interprétation de certains traités sur lesquels l'Indonésie et la Malaisie se fondent. C'est très possible. Mais cela ne suffit certainement pas à justifier une intervention.

D'abord parce qu'il est loin d'être certain qu'une simple interprétation puisse être à l'origine d'un intérêt d'ordre juridique au sens de l'article 62. A cet égard, M. Reisman a insisté sur la différence qui existerait entre «a concern about rules and general principles of law», dont il concède que : «it does not constitute a sufficient interest under Article 62» (CR 2001/3, 28 juin 2001, p. 12, par. 5) d'une part et les préoccupations philippines au sujet des traités et accords applicables d'autre part. J'ai beaucoup de mal à suivre mon ami Michael Reisman sur ce terrain :

— la différence ne peut tenir, contrairement à ce qu'il suggère (*ibid.*), au fait que ces instruments ont un effet *erga omnes* puisque la mise en œuvre des principes et règles de délimitation aboutit exactement au même résultat, lui aussi opposable *erga omnes*;

— elle ne tient pas non plus au fait que les demandes des Philippines seraient plus spécifiques que celles de Malte dans *Tunisie/Libye* ou du Nicaragua dans *El Salvador/Honduras* par exemple; puisque, comme le rappelle à juste titre mon contradicteur (p. 16, par. 13), toute requête à fin d'intervention doit être examinée *in concreto*; et, dans ces deux affaires, la Cour a reconnu que les intérêts invoqués par les pays qui cherchaient à intervenir étaient spécifiques (cf. *C.I.J. Recueil 1981*, p. 17, par. 30 et 1990, p. 124, par. 76); mais, dans un cas comme dans l'autre, la Cour a estimé qu'ils n'étaient pas de nature à fonder une intervention (*C.I.J. Recueil 1981*, p. 19, par. 33 et 1990, *ibid.* et p. 126, par. 82).

En second lieu et surtout, il est impensable que les interprétations que la Cour pourrait être appelée à donner des traités en cause puissent avoir un effet quelconque sur l'intérêt d'ordre juridique que les Philippines prétendent avoir. Elles ne seront données, ces interprétations, qu'aux fins du différend opposant l'Indonésie à la Malaisie, qui porte, est-il nécessaire de le rappeler ?, exclusivement sur la souveraineté sur Ligitan et Sipadan, problème par lequel les Philippines déclarent expressément n'être pas concernées.

Prenons l'exemple, si crucial, de la convention entre la Grande-Bretagne et les Pays-Bas de 1891. Le professeur Magallona en a assez longuement parlé lundi (cf. CR 2001/1, 25 juin 2001, p. 44-48).

Il est clair, Monsieur le président, que l'interprétation des Philippines, quels que soient ses mérites (ou ses faiblesses), n'a aucun lien avec l'objet du différend : elles ne prétendent pas que ce traité, central dans l'affaire qui oppose les Parties, n'est pas valide, ni ne contestent ses effets en ce qui concerne Ligitan et Sipadan. Elles estiment simplement qu'il a été conclu par le Royaume-Uni en tant que «protecteur de l'Etat du Bornéo septentrional» et non pas en son nom propre (CR 2001/1, p. 44-45 (M. Magallona)). Ce peut être ou non le cas; cela peut avoir de l'importance dans le cadre du différend entre les Philippines et la Malaisie sur la partie septentrionale de Bornéo; cela n'a aucune incidence dans le cadre du litige qui est pendant devant la Cour. Je n'ai pas le temps d'examiner un à un les instruments cités par MM. Magallona et Reisman, mais toutes leurs analyses appellent les mêmes remarques, elles n'ont aucune incidence en ce qui concerne la souveraineté sur nos deux îles.

Que résulte-t-il de ces savantes analyses ? Que, dans tous les cas, les Philippines ont des idées arrêtées sur la capacité dans laquelle les Parties à ces instruments les ont conclus et, par voie de conséquence, sur leurs effets quant à la souveraineté sur le nord *de Bornéo* — jamais sur la souveraineté sur Ligitan et Sipadan. Décidément, Madame et Messieurs de la Cour, l'intérêt des Philippines pour les traités et accords pertinents d'une part et l'objet même de l'affaire dont vous êtes saisis, d'autre part, ne coïncident pas et les positions que vous serez conduits à prendre dans votre arrêt ne peuvent aucunement affecter les droits ou intérêts des Philippines.

La ferme position de la Cour dans les remarques finales figurant dans son arrêt de 1981 relatif à la requête à fin d'intervention de Malte dans l'affaire *Tunisie/Libye* s'impose avec plus de force encore dans la présente procédure :

> «Les conclusions auxquelles elle [la Cour] arrivera et les motifs par lesquels elle y parviendra dans l'affaire entre la Tunisie et la Libye [traduisez : «entre l'Indonésie et la Malaisie»] porteront donc inéluctablement, et à titre exclusif, sur les questions dont elle a été saisie par le compromis entre ces deux Etats sur lequel sa compétence est fondée en l'espèce. Il s'ensuit qu'aucune inférence ni déduction ne saurait

légitimement être tirée de ces conclusions ni de ces motifs pour ce qui est des droits ou prétentions d'Etats qui ne sont pas parties à l'affaire» (*C.I.J. Recueil 1981*, p. 20, par. 35.)

Les Philippines, par la voix du professeur Reisman, interpellent les Parties : «pourquoi, nous demandent-elles, s'il n'y a pas de lien entre l'instance et l'affaire en cause, marquer tant de réticence à nous laisser consulter les documents qui dissiperaient nos doutes ?» (cf. CR 2001/3, 28 juin 2001, p. 13, par. 6). Eh bien, justement, Monsieur le président : parce que les Philippines ne démontrent l'existence d'aucun intérêt pour elles en cause susceptible d'être affecté par la décision de la Cour ! Et ce n'est que si elles apportaient la preuve d'un tel intérêt qu'elles auraient un droit à recevoir copie des pièces de procédure en vertu de l'article 85 du Règlement.

Il faut bien dire que, plus les débats progressent, plus les Philippines restreignent l'objet de leur démarche. Au départ, elles affirmaient chercher, d'une manière générale, à «préserver et sauvegarder les droits d'ordre historique et juridique» qu'elles prétendent avoir sur le nord de Bornéo — tel était l'objet premier de l'intervention, décrit au paragraphe 5 de leur requête. Lundi, cet objectif ambitieux disparaissait largement derrière celui, nettement plus limité, d'informer la Cour sur leur interprétation des traités et accords éventuellement pertinents. Hier, les Philippines ont encore restreint leurs ambitions et semblent, dorénavant, n'assigner à leur intervention qu'un seul objectif : obtenir communication des pièces de procédure dans l'affaire principale :

— «we have not received the documents and do not know their contents. As petitioners for the right to intervene, that is one thing that we are asking for» a dit M. Reisman (CR 2001/3, 28 juin 2001, p. 11, par. 3); ou encore :

— et, en guise de conclusions, Monsieur l'ambassadeur Bello lui-même, réitérant les «remèdes» que son gouvernement cherche à obtenir de la Cour par le biais de cette intervention s'est borné à se référer à deux demandes fondées l'une et l'autre sur l'article 85 du Règlement et, en premier lieu, la communication des pièces et documents (*ibid.*, p. 31).

Monsieur le président, je ne peux m'empêcher de penser au poker — ce jeu que, je tiens à le préciser, je ne pratique pas, mais où, je crois, on «paie pour voir». L'avocat des Philippines nous a dit hier que le prix à payer pour une intervention était élevé (CR 2001/3, 28 juin 2001, p. 13, par. 6 (M. Reisman)). L'Etat qui voudrait intervenir n'a pas pu vous démontrer l'existence d'un intérêt pour lui en cause; du coup, il inverse les facteurs et se déclare prêt à payer ce prix élevé pour déterminer si, sur la base des documents qui lui seraient communiqués, cet intérêt ne finirait pas par apparaître, quitte à, finalement, ne pas intervenir le cas échéant.

Cette curieuse présentation des choses appelle deux observations :

En premier lieu, la nouvelle description de l'objectif poursuivi par les Philippines à travers l'intervention qu'elle voudrait voir admise ne me paraît pas crédible. Elle est contredite par la chronologie des initiatives prises par le Gouvernement philippin :

— il a formulé sa demande de communication des pièces le 22 février de cette année;

— sans attendre la décision de la Cour, il a déposé sa requête à fin d'intervention le 13 mars; et

— ce n'est que le 15, *après* la requête donc, que la Cour lui a notifié sa décision de ne pas accueillir sa demande de communication.

Autrement dit, il est assez apparent que le lien, présenté avec de plus en plus d'insistance, entre la non-communication des pièces et la requête en intervention est une construction artificielle, forgée *ex post facto* pour, «apitoyer» la Cour pourrait-on dire.

La seconde remarque que je voudrais faire est la suivante : bien que les Philippines s'en défendent (cf. CR 2001/3, 28 juin 2001, p. 13, par. 7), ce n'en est pas moins en un appel contre la décision de leur refuser l'accès aux pièces que, progressivement, elles ont transformé leur requête à fin d'intervention. Lundi, M. Reisman avait parlé de «déni de justice» (CR 2001/1, p. 22, par. 16 et p. 23, par. 17 et 18); hier, c'est de «caricature of law» qu'il s'est plaint (CR 2001/3, 28 juin 2001, p. 14, par. 7). Ce sont bien des arguments en appel — et de fort sévères...

La Cour ne me paraît pas mériter de tels reproches. Elle s'est bornée à appliquer son Statut et son Règlement, qui impliquent qu'un Etat doit *d'abord* établir qu'il remplit bien les conditions de l'article 62 et qu'il a *ensuite* la possibilité de se prévaloir des droits prévus à l'article 85 du Règlement. *Dura lex*, peut-être, *sed lex*...

J'ajoute une chose : contrairement à ce que semblent penser les Philippines, l'article 62 n'est pas conçu comme une sorte de «joker» que des tiers par rapport à un différent pourraient utiliser pour renforcer leur main dans un litige avec l'une ou l'autre des Parties ou les deux. Et, en tout cas, la question du «lien juridictionnel» et celle de la possibilité d'intervenir en tant que «non-partie» se trouveraient alors posées avec une particulière acuité.

J'ai indiqué mardi que l'Indonésie ne contestait pas que l'information de la Cour pouvait constituer l'objet légitime d'une intervention, et le professeur Reisman a eu la bonté de m'en remercier (CR 2001/3, 26 juin 2001, p. 16, par. 13). Encore faudrait-il que ce mode d'intervention correspondît à un besoin réel, «chevillé» sur l'instance principale. Ce n'est pas le cas en la présente espèce : l'objectif des Philippines n'est pas d'informer votre Haute juridiction sur ses intérêts en cause dans l'instance dont vous êtes appelés à connaître, mais de vous sensibiliser à un autre différend en spéculant que ceci pourrait, peut-être, avoir un intérêt. Au mieux, elles pourraient apparaître comme un *amicus curiae* — mais cela, vous ne l'avez jamais admis, même en matière consultative. Le permettre aujourd'hui serait, je le crains, ouvrir la voie à toutes les dérives : tout finirait par être dans le tout; par contagion, d'autres Etats voisins vous demanderaient à intervenir car tel traité pourrait revêtir une certaine importance pour la solution de tel ou tel différend relatif à une autre île ou à un autre archipel — et l'on ne peut ignorer combien les mers qui baignent l'Indonésie, la Malaisie et les Philippines sont riches de situations qui pourraient s'y prêter... Je préfère ne pas donner d'exemples pour, surtout, ne pas donner de mauvaises idées à d'autres voisins !

Monsieur le président, avec votre permission, je souhaiterais, pour terminer, résumer l'essentiel des positions juridiques de l'Indonésie.

Nous pensons que la demande en intervention des Philippines est intempestive au sens propre du mot — elle n'arrive pas à son heure —, et qu'elle ne respecte pas la lettre ni, sûrement, l'esprit de l'article 81 du Règlement.

Plus grave, elle ne remplit pas les conditions posées à l'article 62 du Statut :

1) l'intérêt qu'invoquent les Philippines n'est pas pour elles en cause dans l'affaire entre l'Indonésie et la Malaisie;
2) si intérêt il y a, c'est dans un autre différend que les Philippines disent avoir avec la seule Malaisie, ce que celle-ci nie, étant entendu que l'Indonésie n'entend prendre aucune position sur ce point, ni, *a fortiori*, sur le fond du litige;
3) accepter l'intervention reviendrait à greffer sur l'instance principale cet autre différend auquel l'Indonésie n'est nullement partie mais sur lequel elle devrait alors se prononcer, ce qu'elle ne

souhaite pas faire — avec le résultat paradoxal qu'elle serait liée par l'arrêt à intervenir alors que les Philippines ne le seraient pas;

4) en tout état de cause, cet arrêt ne saurait avoir une incidence quelconque sur les intérêts que les Philippines disent vouloir sauvegarder;

5) l'information que celles-ci voudraient, par ce biais, donner à la Cour ne constitue donc pas, dans les circonstances de l'affaire, un objet légitime de l'intervention demandée;

6) il en va *a fortiori* de même de l'objectif avoué des Philippines d'obtenir de cette manière communication des pièces et documents, qui leur a été refusée par la décision de la Cour du 15 mars dernier;

7) plus largement, l'intervention des Philippines constituerait un précédent dangereux et mal venu, qui ferait peser une menace grave sur la confidentialité des affaires à laquelle les Etats qui se présentent devant la Cour peuvent légitiment tenir et sur le système même de l'intervention.

Enfin et en tout état de cause, Monsieur le président, l'Indonésie considère que la tenue même de ces audiences, donne plus que largement satisfaction aux Philippines puisqu'elles ont pu exposer à loisir à la Cour (et, au-delà, à l'opinion publique) leur façon de voir sur les traités ou accords qui leur paraissent pertinents à l'appui de leurs positions sur leur litige concernant la souveraineté sur la partie septentrionale de Bornéo — instruments que, par hypothèse, elles connaissent puisqu'ils constituent le fondement de leur revendication.

Il semble à l'Indonésie qu'il convient, à l'avenir, de recentrer les débats sur l'affaire qu'elle vous a soumise d'accord commun avec la Malaisie : la souveraineté sur Ligitan et Sipadan.

Il me reste, Madame et Messieurs les juges, à vous remercier de votre patience — et à vous prier, Monsieur le président, de bien vouloir autoriser l'agent de l'Indonésie à présenter quelques très brèves remarques conclusives. Merci beaucoup.

Le PRESIDENT : Merci Monsieur le professeur. I now give the floor to His Excellency Mr. Hassan Wirajuda, Agent for Indonesia.

**Mr. WIRAJUDA:** Mr. President, Members of the Court, I wish to thank the Court for this final opportunity to address you on the issue of the Philippines Application and to conclude Indonesia's oral presentations.

As counsel have explained the case between Indonesia and Malaysia concerning the issue of sovereignty over the islands of Ligitan and Sipadan is a separate and entirely distinct dispute from the issue of the Philippines claim to parts of Sabah. In bringing their dispute before you by Special Agreement, Mr. President, Indonesia, and I believe Malaysia also, intended the Court to decide the question of sovereignty over the two islands, and this question alone. That is the very limited subject-matter of the Special Agreement, nothing else.

Indonesia has stated before, and reaffirms its position now, that it does not consider it appropriate to express any views with regard to the Philippine historic claims since we are not dealing with the merit of it. This is simply not a matter which concerns Indonesia, and it is not a matter which will be affected or prejudiced by any decision that the Court reaches over the questions of ownership of Ligitan and Sipadan. However Indonesia feels it is obliged to set the record straight on its position which the Philippines referred to as "judicious stands".

Our colleagues from the Philippines in their oral presentation have made repeated references to the 1963 Manila Accord signed by Indonesia, Malaysia and the Philippines. Let me simply recall that that Accord in no way prejudged the merits of the Philippines claim. If I may be permitted to cite the key passage of the 1963 Accord, it provides as follows:

> "The Ministers took note of the Philippines' claim and the right of the Philippines to continue to pursue it in accordance with international law and the principle of pacific settlement of disputes. They agreed that the inclusion of North Borneo in the Federation of Malaysia would not prejudice either the claim or any right thereunder."

However, in a different but related context, Indonesia and Malaysia recognized in their 1966 Agreement that the people of Sabah and Sarawak would be afforded an opportunity to reaffirm, in a full and democratic manner, their previous decision about their status in Malaysia. This position has been strengthened by Indonesia's subsequent diplomatic practices.

The current proceedings between Indonesia and Malaysia are not the place to pursue these matters, or for the Philippines to justify its claims against Malaysia. As I understand the Court's precedents on the question of intervention, there has never been an intervention request which has been directed at safeguarding the applicant State's legal interests vis-à-vis only one of the parties to the main proceedings. Yet this is the situation we are confronted with here.

That being so, my Government does not understand why the present, purely bilateral, proceedings between Indonesia and Malaysia should now be opened up to bring into question a claim which concerns matters between the Philippines and Malaysia, but not Indonesia.

For this reason, as well as on the legal grounds presented by counsel, the Republic of Indonesia respectfully submits that the Republic of the Philippines should not be granted the right to intervene, the effect of which would be to tack on to the proceedings a new case which neither concerns Indonesia, nor relates to the specific dispute jointly submitted to the Court by Special Agreement. This being said, in accordance with Article 62, paragraph 2, of the Court's Statute, Indonesia of course recognizes that it is for the Court to decide upon the Philippines request.

It only remains for me, Mr. President, to thank the Court for the kind attention which they have accorded to me and to the members of the Indonesian delegation. I would also like to express my gratitude to the Agents of Malaysia and the Philippines, as well as to their counsel for the courtesies which they have shown us during these hearings.

Finally, Mr. President, I would like to thank the Registrar and his staff, and the interpreters, for the assistance they have rendered during these proceedings.

That concludes my remarks, Mr. President. Thank you very much.

The PRESIDENT: Thank you very much, Mr. Wirajuda. Ceci conclut le deuxième tour de plaidoiries pour l'Indonésie. La Court prend acte des conclusions finales dont vous avez donné lecture au nom de la République d'Indonésie. Et nous allons maintenant passer la parole à la Malaisie pour le deuxième tour de plaidoirie et je donnerai donc la parole au Professeur James Crawford. Mr. Crawford, you have the floor.

Mr. CRAWFORD: Merci, Monsieur le President. Mr. President, Members of the Court, it is a great pleasure to speak before you again. One preliminary remark: Malaysia will not address the question of procedural delay in respect of this Application. That issue has been fully dealt with by Indonesia. We agree with what they have said; we simply feel no need to add to it. We would only hope that if the Court decides to reject this Application on the ground of procedural delay that, in the words of the President in a recent case, this should not be regarded as having any *a contrario* implication.

1. The Court will have noted that the Philippines request of 13 March 2001 completely failed to specify how a Philippines legal interest could be affected in this case. The request refers to the claim to Sabah but offers no further precision at all. Malaysia had to assume that the Philippines claim was the claim that had been presented in the discussions of the 1960s. In those discussions the Philippines had simply referred to a claim to Sabah. It had claimed if not the whole then a very large part of Sabah and certainly the whole of the east coast. There was never any previous suggestion, for example, that Tawau or Cowie Bay or the entirety of the Semporna peninsula were not part of the claim.

2. Moreover if the claim was a coherent one, then Tawau and Cowie Bay and the entirety of the Semporna peninsula *should* have been included in it. The Philippines claim is as successor not to the United States, not to Spain, but specifically to the Sultan of Sulu. You heard Prof. Magallona on that (CR 2001/3, p. 25). Spain and the United Kingdom were obliged to respect the boundaries to which they had agreed in 1885 and 1930, respectively. But the Sultan was not, because he retained sovereign capacity in respect of Borneo even though he had lost it in respect of Sulu. That is the Philippines case.

Now the Sultan's original grant of 1878 covered the whole east coast down to the Sibuko River. The graphic, I might say, is graphic 1 in your folder. The claim went down as far as the red line approximately. The Philippines showed this in one of the graphics on Monday, which is back on the screen — I am grateful to my colleagues from the Philippines for lending us their graphics. The grant is shown as the red line on the east coast; you see how far down it extends. Moreover, the Sultan's confirmation of 1903 purported to cover offshore islands beyond 9 nautical miles along that coast, including several islands by name which the Philippines now does not claim. It was logical to think that if the Philippines was successor to the Sultan of Sulu then its rights would be the same as the Sultan's had been.

3. It was only when we read Indonesia's written statement that we discovered that the Philippines does not claim the two islands. It was only when we saw the Philippines letter of 5 April 2001. On Monday we saw for the first time the actual extent of the Philippines claim, now

seen in yellow on the screen. It is perhaps the first egg-shaped territorial claim in international legal history, but apparently this is a case of first impression (CR 2001/1, p. 18). You see on the screen, this claim shown by Prof. Magallona, and you can see it does not cover the same area as the Sulu grant. It falls short precisely in the area of the islands. How convenient!

4. Prof. Pellet emphasized on Tuesday that the Philippines declaration that it does not claim the two islands is legally binding on it (CR 2001/2, p. 25). Professor Pellet is right. I pause only to note that he is right for the wrong reasons. The reason is not estoppel. The reason is that this is a binding unilateral act under the *Eastern Greenland* and *Nuclear Tests* principle. There is no estoppel because Malaysia has not relied on the Philippines declaration. How could we have? We didn't know anything about it until Indonesia gave it to the Court on 2 May. We appreciate Indonesia's candour in doing so; it's not clear that it was intended for circulation.

5. Now the Philippines statement that it does not claim the two islands transforms the situation from the point of view of intervention under Article 62. If it had claimed them, it was arguably entitled to intervene because it would have asserted a legal interest in the subject-matter of the dispute. That was the basis on which Nicaragua and Equatorial Guinea were allowed to intervene — they claimed part of the area which was in dispute in the case, respectively the Gulf of Fonseca and the areas around the Zafiro oil field.

6. By contrast, when a State does not claim particular territory it has not been allowed to intervene, even though it said that the Court's decision on the territory might impact on it in some way. That was the position of Nicaragua in respect of the islands in the Gulf — it did not claim them and it was not allowed to intervene as to them.

7. Mr. President, when we thought — quite reasonably — that the Philippines claimed the east coast and all its islands down to the Sibuko River, we had a problem in resisting its intervention. We had to show that its claim was nonsense. That is not difficult to do, since the claim depends — among many other things — on the proposition that the private law heirs of the last Sultan retained his sovereignty over territory which they could cede to the Philippines in a private law deed. They carried that sovereignty around with them, apparently, in their collective pockets. Now that is a wholly untenable proposition, but I can understand the Court not wanting to go into it at all. After all it has not been submitted to you.

8. But now the Court is in a different position. It does not have to face the problem of a request to intervene based on a State's claim to disputed territory where the claim is wildly implausible. There is no dispute about these two islands between Malaysia and the Philippines. There is no dispute over them between Indonesia and the Philippines. There is only a dispute between Malaysia and Indonesia, and it is this dispute which you are asked to resolve, not some other dispute.

9. So how does the Philippines make out its claim that it has a legal interest in the decision in this case? Note that Article 62 says "decision". A State can only intervene if it has a legal interest in the very thing to be decided in the case — here, sovereignty over the two islands. An interest in the development of the law is not enough. Global dispute settlement is not enough. Giving the Court more information is not enough. The Court may well feel it has enough information about these two islands!

10. In particular a State cannot intervene under Article 62 just because it feels or fears that in the course of its reasoning in a case, the Court may say something which has implications for that State's own separate claim. Article 62 is not intended to cover such a case. If it did, then we would have to enlarge this court room, because in virtually every boundary dispute there will be other States who fear that they may be affected, applying Prof. Reisman's "test of consequentiality" (CR 2001/3, p. 15). There will be queues of States seeking to intervene. Far from facilitating dispute settlement that will make it more difficult.

11. Now the Philippines tries to get around this in two ways.

12. First, it says that the Sipadan and Ligitan case involves the interpretation of treaties and agreements on which the Philippines bases its — separate — claim to part of Sabah (see, for example, CR 2001/1, pp. 17, 28). But it entirely fails to make precise what propositions it draws from those treaties that the Court may need to consider in order to decide this case. It complains — no less than 33 times[1] — that the Court did not give it access to the pleadings so it does not know what Malaysia said. The highest ratio of complaints to time spent, I think, in the history of the Court, but this is a case of first impression. Incidentally, the Philippines never wrote to ask us

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[1] CR 2001/1, paras. 6, 7 (Ambassador Bello); paras. 2, 3, 12, 13, 14, 15, 16, 17, 18, 19, 21, 27, 33, 36, 38, 42, 44, 46, 47 (Prof. Reisman); CR 2001/3, paras. 2, 3, 6, 7, 12, 13, 16, 17, 18, 20 (Prof. Reisman); paras. 2, 3 (Ambassador Bello).

directly for the pleadings, or to ask us to summarize our case, which would have been a normal first step.

13. But the Philippines knows what is in the treaties and agreements. It could have specified what propositions in those treaties, what provisions, what points of interpretation, are vital to its claim. It has never done so. Had it intervened under Article 63, no question of legal interest would have arisen. But it would still have had to specify the point of construction of the treaty which was in question. Of course under Article 63 it would then have been bound by the Court's interpretation on the question of construction. Despite its protestations that is the last thing the Philippines wants, to be bound by your decision. Rather it simply wants to come, like a loose canon, and interfere in a territorial dispute in which it professes to have no direct interest at all, in order to protect its own alleged separate interest in different territories. That is not the purpose of Article 62.

14. Anyway the Philippines claim to Sabah is not based on any treaties. It is not based on the 1885 Protocol, or on the 1930 Convention. It is based on a private law cession by the private law heirs of the Sultan of Sulu dating from 1962. Prof. Magallona was quite clear about it (see, for example, CR 2001/1, p. 36; CR 2001/3, pp. 22, 25).

15. The second way the Philippines tries to deal with this point is by the argument that the Court's reasons will, or may, affect the separate claim of the Philippines to parts of Sabah. Prof. Reisman put it very clearly in the following words:

> "if [Malaysia's] theory of the case imports a claim of title that is inconsistent with the claim of title upon which the Philippines bases its claim to territories in North Borneo, that interpretation will affect interests of a legal nature" (CR 2001/3, p. 15).

Yet again Prof. Reisman rewrites Article 62 of the Statute. On Monday he paraphrased Article 62 approximately as follows: "if a third State subjectively feels it has a stake in some proceedings which may be affected it should be allowed to intervene, to see the pleadings and it will tell us all later whether it wants to take the matter any further" (CR 2001/1, pp. 27-28, 32). The word "stake" I thought was particularly telling. That is so obviously not what Article 62 says that he tries again. This is his second round interpretation:

> "If the theory of a party's case involves points for interpretation that might be inconsistent with the theory of a territorial claim made by a third State, then even though that claim affects different territory, the third State should be allowed to intervene to protect its own theory." (CR 2001/1, p. 15.)

Actually, it's a bit like the mythical Chapter 6-and-a-half of the Charter: we might call this Article 62-and-a-half of the Statute. It is all about theories and interpretation and contingency and subjectivity and interdependence. It bears no relation to the written words, and this Court has recently reminded us of the importance of what the words of a treaty actually say (*LaGrand*, Judgment of 27 June 2001, para. 77). The crucial word in Article 62 is "decision".

16. But anyway let us assume for the sake of argument that Prof. Reisman's consequentiality test is right and that an intervening State has a legal interest in a case if a party's theory of the case might be inconsistent with the intervenor's theory in some other case. According to this test, there is legal interest as between two separate claims if the theory of one is or may be inconsistent with the theory of another. Well let's accept it for the sake of testing it *Even so, it is still necessary to point to the inconsistency.* What are the propositions that form part of the Philippines theory of its claim to Sabah which the Court might have to decide in this case? The Philippines must be able to articulate what those propositions are, irrespective of what the Parties may have argued. It must — presumably — be aware of the legal theory on which this so-called long-standing claim is based. So where is the potential inconsistency? The Philippines has not bothered to tell the Court.

17. Let me however take Prof. Magallona's presentation and try to identify those Philippine propositions which form the theory of its claim and ask whether they are raised by the present case. Let me take five of them. In respect of each of these, when I use the phrase "parts of North Borneo" I mean the egg-shaped claim you see on the screen, which excludes the two islands and the other islands in the Ligitan Group and Cowie Bay and the northern part of Sebatik Island. On that understanding let us look at Prof. Magallona's propositions:

*Proposition No. 1*. The Philippines fundamental proposition is that the private law heirs of the Sultan of Sulu collectively retained sovereignty over parts of North Borneo in 1962, which sovereignty they could, notwithstanding the treaty obligations of the Philippines, cede to the Philippines (CR 2001/1, pp. 36-37). The Court does not have to decide that. Nothing that happened in Manila in 1962 is relevant to the question whether Sipadan and Ligitan belong to Indonesia or Malaysia. So the so-called cession of 1962 cannot affect this case.

*Proposition No. 2*. The Philippines argues that the 1878 grant of the Sultan of Sulu was valid (CR 2001/1, pp. 22, 39-40). Malaysia's case does not depend upon whether it was valid or not.

The validity of that grant is not an issue between Malaysia and Indonesia. Spain and the United Kingdom expressly left that point to one side in concluding the 1885 Protocol. This was the reason for the phrase "territories on the continent of Borneo, which belong, or which have belonged in the past, to the Sultan of Sulu", in Article III (Memorial of Malaysia, Vol. 2, Ann. MM 15, p. 65). They did not agree on the point, they did not have to resolve their disagreement, neither does the Court.

*Proposition No. 3.* Then the Philippines argues that the 1885 Protocol left the Sultan's rights over parts of North Borneo unaffected (CR 2001/1, pp. 41-42). That is not an issue in this case. Malaysia's title to the islands does not depend upon the 1885 Protocol, which only concerned islands beyond 9 miles of the coast. It was unaffected by it.

*Proposition No. 4.* Then the Philippines argues that the Convention of 1930 left the Sultan's rights over parts of North Borneo unaffected (CR 2001/1, p. 46; CR 2003/3, pp. 21-22). That too is not an issue in this case. The Court may perhaps have to say something about the territorial scope of the 1930 Convention as concerns the two islands — although that is a subsidiary point. But the territorial scope of the Convention as concerns the area claimed by the Philippines is perfectly clear and is not an issue in this case. Anyway the Philippines claim to certain parts of Sabah does not depend on the territorial scope of the 1930 Convention. Neither Malaysia nor Indonesia has said anything in the pleadings about the effect of the 1930 Convention on the Sultan of Sulu. To repeat, that is simply not an issue.

*Proposition No. 5.* Then the Philippines argues that the 1946 proclamation of North Borneo as a British colony was unlawful vis-à-vis the Sultan of Sulu and could not have affected his rights (CR 2001/1, pp. 48-49). That too is not an issue in this case. If Sipadan and Ligitan were not part of North Borneo in 1945, the proclamation of North Borneo as a British colony did not change that situation. The proclamation of North Borneo as a British colony made no territorial difference. No question of the legality of the 1946 proclamation vis-à-vis the Philippines could possibly be relevant to the two islands.

18. Mr. President, Members of the Court, that makes five propositions which are part of Prof. Magallona's theory of the case. They may not be the only ones but they are the essential ones. *Not one of them is an issue in this case.* No argument has been addressed to the Court by

either of the Parties on any of these issues. If the Court were to decide them it would be acting *ultra petita*. I suppose it is possible that the Court might say things in passing which might indirectly reflect upon one or other of them — though the Court is normally very careful about what it says. In any event a State cannot intervene under Article 62 out of a fear of possible *obiter dicta*. And I am sure that after this week of argument the Court will be careful to limit itself to what is necessary in this case.

19. Mr. President, Members of the Court, intervention is, as Prof. Reisman says, a necessary weapon in the Court's procedural armoury. It is one of the things that distinguishes this Court from an *ad hoc* arbitral tribunal. But the Court's function is still to decide cases brought to it by consenting States on the basis of respect for international law as between those two States. It is not to engage in a free-ranging discussion about the disputes of the region. A State which seeks to intervene under Article 62 has to comply with its requirements. The Philippines having applied under Article 62 has *first* to identify with precision its own legal interests and, *secondly*, to say how they may be affected. In the absence of access to the pleadings, I suppose it may be marginally more difficult to do the second of these things. But the Philippines could certainly have done the first, and anyway there is no particular mystery about these two islands, which have been discussed in some detail in the published literature. The Philippines completely failed to do either of those two things: first, to identify with precision its own legal interest in relation to the dispute, now that it does not claim the islands; secondly, to clarify how those legal interests may be affected by the decision in this case. In those circumstances, its request can and should be rejected without any prejudice to the valuable incidental role that Article 62 can perform in appropriate cases. As you can see from the map on the screen and the egg-shaped claim, this is not such a case.

Mr. President, Members of the Court, thank you for your attention. May I ask you, Sir, to call upon Sir Elihu Lauterpacht.

Le PRESIDENT : Merci beaucoup, Monsieur le professeur. I now call Professor Sir Elihu Lauterpacht.

**Sir Elihu LAUTERPACHT:**

1. Mr President and Members of the Court, I will be relatively brief. I will not spend time in replying to certain remarks made on behalf of Indonesia on 26 June regarding references by Malaysia to the Indonesian claim to Pulau Ligitan and Pulau Sipadan (CR 2001/2, p. 12). This is a matter relevant only to the proceedings on the substance of the case and can be left until then. The same goes for the implications that Indonesia sought to draw from the Philippines letter addressed to Indonesia renouncing any territorial interest in the two islands (CR 2001/2, pp. 37-3[illegible] As regards these matters, I merely reserve Malaysia's position.

2. I go straight away to the main point that requires consideration. The Court will recall that on Tuesday I identified the concern expressed by the Philippines in its statement of the first and second objects of its Application as being focused on the preservation of what it called its "historical and legal rights" to dominion and sovereignty over North Borneo. I submitted that these so-called "rights" were so insubstantially supported that they could not properly be treated by the Court as validly justifying the Application for intervention.

3. In particular, I referred to certain acts of Philippine recognition of, and acquiescence in, British sovereignty over North Borneo (CR 2001/2, pp. 56-57). To my references to four treaties between the Philippines and Britain in which reference was made to British North Borneo, the only reply given by distinguished counsel for the Philippines, Prof. Magallona, was that

> "The Philippines does not see how specialized bilateral agreements with respect to air services or labour employment, or a proposal on the maintenance of a lighthouse, . . . can possibly be invoked against the Philippines as recognition of, or acquiescence to, British title over North Borneo." (CR 2001/3, p. 24, para. 16.)

The answer is quite simple: When a treaty between two States refers to a certain territory as belonging to one of them, the other cannot subsequently be heard to deny that that is the fact. It is a form of recognition or estoppel or preclusion. But no matter what name one may give to the legal process, and it will depend to some extent on the circumstances, the legal effect is undeniable. It could only have been avoided if the Philippines had made some express reservation. So far as I am aware, they never did this.

4. Likewise, counsel for the Philippines completely evaded the instances that were given of acquiescence by the Philippines in conduct related to British title over North Borneo. The Court

will recall that it was Prof. Magallona himself who first referred to the advice given by Governor Harrison in 1947, to the then President of the Philippines. He spoke of the British North Borneo Cession Order as an act of "political aggression" and he advised the President to repudiate it. Prof. Magallona said that the act had been repudiated (CR 2001/1, p. 49, para. 42). I replied that I had found no evidence of such repudiation and suggested that Prof. Magallona might provide further information when next he spoke. But when he spoke yesterday he did not respond to that suggestion. The only reference that was made to the episode was that it had taken place before 1962 (CR 2001/3, p. 25, para. 18).

5. Why does that year matter? Because that is the date which the Philippines now identifies quite firmly as being the date on which it acquired title to North Borneo. As Prof. Magallona put it:

> "[T]he title of the Philippines to North Borneo is based on the cession effected by the Sultanate of Sulu in favour of the Philippines of certain territory in North Borneo. Legally and logically, the Philippines can only be in a position to question British pretensions to sovereignty over North Borneo *after* that cession has taken place in 1962."

And in the text of Prof. Magallona's statement the word "after" in the phrase "after that cession has taken place" has been emphasized (CR 2001/3, pp. 24-25, para. 16).

6. Mr. President and Members of the Court, before I came into this courtroom at the beginning of this week, I evidently did not clearly understand the nature of the Philippines claim to North Borneo. I had been relying on two Philippines documents relating to the matter.

7. The first was the Philippines Application to intervene in the case. The expressions in it relevant to the Philippines claim were, first: "The Constitution of the Republic of the Philippines, as well as its legislation, have laid claim to dominion and sovereignty over North Borneo." No dates were attached to the Constitution or the legislation. And, second, reference was made "to the historical and legal rights of the Government of the Republic of the Philippines". That reference led me to believe that we were dealing with a claim of some antiquity. Nowhere was any reference made to what is now said by the Philippines to be the controlling element — the so-called cession by the Sultanate of Sulu as late as 1962.

8. The other document by which I was guided is the one that I hold in my hands now. It is a copy of an official publication of the Government of the Philippines. It is entitled: "Philippine

Claim to North Borneo; Volume 1". The book was printed by the Bureau of Printing, Manila, in 1963. It is referred to in the Malaysian observations at page 2, footnote 2, and was deposited with the Court when those observations were filed on 2 May this year.

9. The opening document in it is an excerpt from President Macapagal's State of the Nation message to the Congress of the Philippines on 28 January 1963. It appears in your blue folder as tab 3. It begins by saying:

> "The most important action taken in the field of foreign relations in the past year was the official filing on June 22, 1962, with the United Kingdom of the Philippines claim of sovereignty, jurisdiction and proprietary ownership over North Borneo as successor in interest of the Sultan of Sulu."

10. But as the President's statement proceeds to make clear, the claim did not really rest upon the 1962 cession by Sulu. President Macapagal continued (and this is important):

> "Contrary to allegations in some political quarters, this was not a precipitate action. We have personally studied this claim over a period of years. While serving in the Department of Foreign Affairs in 1946, upon a study of this claim in connection with our successful negotiation for the reacquisition of the Turtle Islands, we advocated the filing of this claim."

I interject, that was 16 years before the Sulu cession was advanced as the basis of the Philippine claim. I continue with the President's statement:

> "In 1948, while serving in the Philippines Embassy in Washington DC we went over the claim with an American expert in Anglo-Saxon law in George Washington University who sustained the view that this is a valid claim."

This was in 1948.

> "When we served in the Congress of the Philippines, we successfully authored and sponsored in 1950, a resolution for the filing of this claim. Upon becoming President of the Philippines, acting on the conviction that this was not only a valid claim but that its presentation was demanded by the national interest, it became our inescapable duty to act on the bipartisan resolution of the House of Representatives of April 24, 1962 that the claim be filed now or never."

I emphasize "or never". And the 1950 resolution to which I have just referred is tab 13 in the Philippine folder handed to the Court on 25 June.

11. I must ask to be forgiven, Mr. President, for having taken this statement, as well as the material accompanying it in the official Philippines volume, as evidence of a firm Philippine conviction prior to the so-called cession of 1962 that it had a claim to North Borneo. What is more, for all the importance now given by the Philippines to the so-called 1962 cession, we have yet to

see a copy of this document. It has not been printed in the many official documents accompanying the Philippines publication.

12. Mr. President, if any apology is needed for touching again upon the merits of the Philippine claim at this late stage of the hearing, I respectfully tender it. But the Court will fully understand why I do so. It is to back up to the hilt my contention that the Philippines claim is manifestly unsustainable and fraught with inconsistency. The Court should, I respectfully submit, be most cautious lest it be seen to be accepting as a valid object of the Philippines Application the preservation of "so-called historical and legal rights" that have, for all practical purposes, no identifiable basis whatsoever.

13. And this consideration is the more compelling because once one has disposed of the pretence that the Philippines did not believe that it had a claim until 1962, one comes back to the fact that between 1946 and 1962 the Philippines could have asserted its position in this Court but it did not do so. Counsel for the Philippines has made no reference to this aspect of the matter. Nor, I may add in passing, is the major uncertainty regarding the dates at which the Philippines claim came into existence the only example of serious inconsistency by which the Philippine approach to the question of North Borneo is flawed. On 4 August 1977, the then President of the Philippines, at a meeting of ASEAN Heads of State, solemnly affirmed with all the authority attaching to his high office, that the Philippines would be taking definite steps to eliminate the claim of the Philippines to Sabah. Permit me to read the following relevant passage from the statement which appears in your blue folder at tab 4:

> "As a last observation and as the last point of faith may I further state that perhaps it is time to remember that like any cooperative endeavour, ASEAN requires sacrifice for every gain and advantage and that each and every nation must contribute to that pool of sacrifice to make ASEAN a success. Before ASEAN can look to the outside world for equity, for justice and fairness we must establish order, fairness and justice amongst ourselves. As a contribution, therefore, I say in earnest to the future of ASEAN, I wish to announce that the Government of the Republic of the Philippines is therefore taking definite steps to eliminate one of the burdens of ASEAN — the claim of the Philippines Republic to Sabah. It is our hope that this will be a permanent contribution to the unity, strength and prosperity of all of ASEAN."

Well, regrettably, this pledge appears not to have been fulfilled. What was promised on 4 August 1977 has been reversed by the Application filed on 13 March 2001.

14. I cannot conclude without referring to the cavalier manner in which the Philippines has sought to dispose of the important fact that when North Borneo joined the Federation of Malaysia this was a specific and deliberate exercise of the right of self-determination by the people of that country. The act of the Secretary-General of the United Nations in confirming that act of self-determination cannot be dismissed (as the Philippines is seeking to do) by calling it simply a "confirmation by the international community of Malaysia's political identity". It was the international seal of approval put upon the solution of the specific problem of the future government of the people of North Borneo. It excluded the sovereignty of any other country. It cannot be regarded as something "irrelevant". Self-determination is a fact which determines sovereignty — whether or not it is something to which the original sovereign consents. It is the fact out of which the new sovereignty arises and even my late father (to whom Prof. Magallona was good enough to refer) would not have said otherwise. It is inconceivable that any weight should be attached to the ambitions of the absent heirs of an ancient ruler in contradiction of the clearly expressed and long-established and recognized will of the people.

15. As I approach my conclusion, I am bound to ask: what are the limits to intervention if the Court accepts the present Application of the Philippines? There is a real danger that if the Court were to accept the Philippines thesis, the scope of Article 62 would have been construed so widely that it could embrace even matters that fall within Article 63, and recourse to the latter Article would become unnecessary. In so far as allegedly relevant treaties are concerned, a State could present its views under Article 62 without the need to become a party. Why then should it resort to Article 63 and become bound by the substantive judgment that would follow?

16. Generally speaking, the basic condition of consent that underlies the exercise of jurisdiction by the Court would be significantly eroded. Parties to special agreements would fear that their careful identification of the question dividing them, and their willingness to see that question, and no other, settled as between them, could be frustrated by some unforeseen intervention relating to a marginal and possibly irrelevant issue. Apprehensive about such a risk, States would be bound to assess carefully whether their interests would be better served by recourse to the Court with a generously construed possibility of intervention; or by *ad hoc* arbitration with no risk of intervention.

17. On that brief note of concerned enquiry I bring my response to an end. Mr. President, I would be grateful if you would now call upon H.E. Tan Sri Abdul Kadir Mohamad, Agent of the Government of Malaysia, briefly to conclude Malaysia's case.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. I now give the floor to H.E. Tan Sri Abdul Kadir Mohamad, Agent of Malaysia.

Mr. MOHAMAD: Mr. President, distinguished Members of the Court,

1. In my opening remarks on Tuesday, I had respectfully requested the Court to deny the Philippines request to intervene in order to enable the Court to deal with, in due course, the merits of the bilateral dispute between Malaysia and Indonesia without any distraction by a third party making a claim which is separate and distinct from the question of sovereignty over Ligitan and Sipadan.

2. We have all heard this week the pleadings of the Agent and counsel for the Philippines which were, for a great part, an undisguised attempt to distract the Court from the real issue at hand. The Court had asked the Parties to appear before it this week in order that the Court could hear the arguments for and against the Philippine Application for permission to intervene in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, not to listen to an exposition of the Philippine claim to Sabah.

3. If this week's performance of the Philippine team were any guide, I venture to predict that there will be a repeat performance of more of the same if the Court were to allow the Philippines request to intervene at the stage of the examination of the merits of the case between Malaysia and Indonesia that is before the Court. That, I believe, the Court wishes to avoid.

4. May I therefore respectfully urge the Court to deny the Philippines the undeserved privilege of any further participation in this matter, and reject its request to intervene in this case. After all, by its own admission, the Philippines does not have any territorial interest on the islands of Ligitan and Sipadan, which, I might repeat, are the only subject-matter of the present case.

5. Mr. President, before ending my remarks, allow me to point very briefly to one disturbing distortion of my statement on Tuesday. Referring to Malaysia, Prof. Reisman accused its Agent of "even announcing in open court that its own position was non-negotiable" (CR 2001/3, p. 12,

para. 4). But as you have heard me saving and as recorded in the verbatim record (CR 2001/2, p. 44, para. 20) Malaysia stated "The f[illegible]e of the people of Sabah is non-negotiable."

6. Mr. President, distinguished Members of the Court, the delegation of Malaysia has valued greatly the opportunity to appear before the Court to explain Malaysia's opposition to the Philippines Application for permission to intervene in the case between Malaysia and Indonesia. I would like to thank the Court for having so patiently heard our pleadings. I conclude by formally making our submission that the Court should reject the Philippine Application. Thank you very much.

The PRESIDENT: Thank you very much. Je vous remercie, Monsieur Kadir. Ceci met un terme à la deuxième série de plaidoiries pour la Malaisie. La Cour prend acte des conclusions finales dont vous avez donné lecture au nom de la Malaisie, comme elle l'a fait ce matin pour les conclusions finales présentées par M. Wirajuda, agent de l'Indonésie, et hier pour celles des Philippines présentées par M. Bello.

Ceci nous amène à la fin de cette série d'audiences consacrées à la requête à fin d'intervention présentée par la République des Philippines en l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*. Je tiens à adresser mes remerciements aux agents, conseils et avocats pour la précieuse assistance qu'ils ont bien voulu fournir à la Cour et ce, très heureusement, dans le temps qui leur avait été assigné. Je les remercie également pour l'esprit de courtoisie et de respect mutuel dont ils ont fait preuve tout au long de ces audiences.

Conformément à la pratique, je prierai les agents de rester à la disposition de la Cour pour tous renseignements complémentaires dont elle pourrait avoir besoin. Sous cette réserve, je déclare maintenant close la procédure orale consacrée à la requête à fin d'intervention des Philippines en l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*.

La Cour va maintenant se retirer pour délibérer. Les agents des Parties, ainsi que celui des Philippines, seront avisés en temps utile de la date à laquelle la Cour rendra sa décision.

La Cour n'étant saisie d'aucune autre question aujourd'hui, l'audience est levée.

*La séance est levée à 11 h 35.*

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**Séance publique du 23 octobre 2001, à 15 heures**
**(Affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)* *Requête des Philippines à fin d'intervention*)**

The PRESIDENT: Please be seated. The sitting is open. The Court meets today, pursuant to Article 58 of its Statute, to deliver in open court its Judgment on the application by the Philippines for permission to intervene in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaisia)*, filed by the Government of the Philippines on 13 March 2001 under Article 62 of the Statute.

I shall recall that the proceedings in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* were instituted by notification to the Court, on 2 November 1998, of a Special Agreement signed on 31 May 1997 between the Republic of Indonesia and Malaysia for the submission to the Court of a dispute between the two States concerning sovereignty over Pulau Ligitan and Pulau Sipadan, two islands lying off the north-east coast of Borneo.

In accordance with Article 83, paragraph 1, of the Rules of Court, the two Parties to the case, Indonesia and Malaysia, were invited to submit, by not later than 2 May 2001, written observations on the Philippine Application for permission to intervene; each of them presented such observations within the time-limit so fixed. Those observations were exchanged between the Parties and transmitted to the Philippines. In their written observations, both Indonesia and Malaysia objected to the Application for permission to intervene. Article 84, paragraph 2, of the Rules of Court provides that, if an objection is filed to an Application for permission to intervene, the Court shall hear the State seeking to intervene and the parties before deciding. Public hearings were consequently held for that purpose on 25, 26, 28 and 29 June 2001, during which the Court heard oral statements and replies from the Philippines and the Parties in regard to the question whether the Philippine Application for permission to intervene should be granted.

As usual, I shall not read the introductory paragraphs of the Judgment, which set out the procedural history of the case and reproduce what was stated by way of conclusion by the Philippines and the Parties to the case. I shall accordingly begin the reading of the Judgment at paragraph 14. Furthermore, in the interest of time, I shall not read out in full certain parts of the Judgment relating to the arguments relied on by the Philippines and the Parties.

[Le président lit les paragraphes 14 à 95 de l'arrêt[1]]

Je prie à présent le greffier de lire le dispositif de l'arrêt en anglais.

[The Registrar reads the operative clause in English[2]]

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[1] *C.I.J. Recuil 2001*, p. 582-607.

[2] *I.C.J Reports 2001*, p. 607.

**Le PRESIDENT : M. ODA, juge, joint à l'arrêt l'exposé de son opinion dissidente; M. KOROMA, juge, joint à l'arrêt l'exposé de son opinion individuelle; MM. PARRA-ARANGUREN et KOOIJMANS, juges, joignent des déclarations à l'arrêt; MM. WEERAMANTRY ET FRANCK, juges *ad hoc*, joignent à l'arrêt les exposés de leur opinion individuelle.**

**L'arrêt, dont le texte anglais fait foi, est comme à l'accoutumée disponible dès aujourd'hui sous forme multicopiée. Il a été également placé sur le site Internet de la Cour. Le texte imprimé sera disponible dès que possible.**

**La Cour n'ayant pas d'autre point à son ordre du jour, je déclare l'audience levée.**

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